

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, December 1, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 1:15 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD L. LITVACK, Commissioner
DEBRA A. VALENTINE, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director
and General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

C O N T E N T S

Hearing: Statutory Immunities and Exemptions

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Prof. Peter C. Carstensen
James C. Miller III
Prof. Stephen F. Ross

P R O C E E D I N G S

CHAIRPERSON GARZA: I would like to welcome you all to this afternoon's hearings of the Antitrust Modernization Commission. We will be having two panels, or three panels, I guess, on the issues relating to immunities and exemptions. On our first panel, we have one speaker, Mr. John Sullivan, who is the general counsel at the U.S. Department of Commerce, who has brought some colleagues with him.

What I will do is--I think we are only going to have one microphone open, but if you could feel free to introduce the gentlemen that you have brought with you.

The way we usually proceed is to give the witness about five minutes to summarize his testimony, and then we allow time for the Commissioners to ask questions.

This panel is scheduled to be for 45 minutes, so what we will do is give you an opportunity to summarize your statement, and then spend the rest of the time with questions from the Commissioners. I guess all of the Commissioners will

1 have then five minutes each.

2 So with that, Mr. Sullivan, if you would
3 like to take the time to introduce your colleagues
4 and also to summarize your statement.

5 MR. SULLIVAN: Thank you, Chairwoman Garza,
6 Vice Chair Yarowsky, and other distinguished
7 Commissioners. Thank you for inviting me to testify
8 before the Commission today.

9 I have brought with me some colleagues from
10 the Department of Commerce. To my right, far right,
11 is David Bowsher, who is Senior Counsel in my office.
12 To my immediate right is Jeffrey Anspacher, who is
13 the Director for Export Trading Company Affairs at
14 the Department of Commerce. And then to my left is
15 John Masterson, who is the Deputy Chief Counsel for
16 International Commerce and our principal legal expert
17 on the Export Trading Company Act.

18 My testimony today is limited to the Export
19 Trade Certificate of Review program administered by
20 the Department of Commerce under the authority of
21 Title III of the Export Trading Company Act.

22 The Department strongly supports this
23 program, which creates opportunities for small and

1 medium-sized companies that would otherwise not be
2 able to export or not be able to export on a
3 sustained basis.

4 As the numerous public comments received by
5 the Commission on this program demonstrate, it is
6 invaluable in promoting U.S. exports.

7 Through Export Trade Certificates, the
8 Departments of Commerce and Justice provide U.S.
9 firms with pre-clearance to coordinate and conduct
10 export activities under the terms and conditions
11 specified in Certificates issued by the Department of
12 Commerce.

13 Vetting of the Certificate applications by
14 the Departments ensures, as required by Title III,
15 that the proposed export activities will not have
16 anticompetitive effects in the United States.

17 No proposed export activities are approved
18 that would violate federal or state antitrust laws.
19 Thus, only after a thorough review of a Certificate
20 application and a determination that the proposed
21 export activities would not violate the standards
22 specified in Title III will the Secretary of
23 Commerce, with the concurrence of the Attorney

1 General, issue an Export Trade Certificate.

2 Even after the Certificate is issued, the
3 Certificate holder remains under the oversight of the
4 Departments of Commerce and Justice and is required
5 to file annual reports on the export activities
6 engaged in under the Certificate.

7 The benefits of this program are well
8 established. Export Trade Certificates promote and
9 encourage joint export activities, particularly by
10 small and medium-sized companies, by providing
11 Certificate holders with a high level of assurance
12 that, while they remain within the specified
13 boundaries of their Certificates, they will not be
14 found to have violated U.S. antitrust laws.

15 This allows exporters to establish joint
16 ventures that can, for example, negotiate lower
17 overseas shipping rates, help U.S. exporters overcome
18 export barriers and increase their competitiveness in
19 foreign markets.

20 By forming export joint ventures, spreading
21 risks, and sharing costs, firms can reduce their
22 individual costs and allay their fears of exporting.
23 Approximately 3,000 companies now enjoy the pre-

1 clearance provided by an Export Trade Certificate of
2 Review, while exporting over \$10 billion annually.

3 Almost every country that has antitrust laws
4 exempts export activities that do not adversely
5 affect its domestic market. Under Title III, the
6 United States provides the same benefit to its
7 exporters through a highly transparent process
8 incorporating public notice, opportunities for public
9 comment, antitrust enforcement agency review, and
10 ongoing U.S. government oversight, including
11 modification or revocation of Certificates as
12 necessary.

13 The positive effect of this transparency is
14 evidenced by the fact that there has never been a
15 successful antitrust challenge to export conduct
16 covered by a Certificate of Review either in the
17 United States or, to the best of our knowledge,
18 anywhere else in the world.

19 This is a tribute to the careful manner in
20 which Title III has been administered by the
21 Departments of Commerce and Justice and to the
22 procompetitive uses of Title III by U.S. exporters.

23 Indeed, Export Trade Certificates of Review

1 encourage small and medium-sized U.S. companies to
2 compete in foreign markets, thereby benefiting
3 consumers abroad. We believe that the program is in
4 fact procompetitive.

5 Moreover, the pre-clearance procedure
6 established by Title III has not hindered the United
7 States' ability to work with other countries in their
8 development of antitrust laws. With the support of
9 the United States government, the number of countries
10 with antitrust regimes has grown from 25 to over 100
11 in the past 15 years.

12 Illustrative of the U.S. government's
13 continued role in supporting such development, the
14 Department of Commerce, in conjunction with other
15 U.S. government agencies and the private sector,
16 recently sponsored a week-long exchange with members
17 of the Chinese government to assist in the
18 development of China's first ever antitrust law.

19 Export Trade Certificates also eliminate
20 foreign trade barriers. U.S. agricultural exporters,
21 for example, use Certificates to administer tariff
22 rate quotas implementing agricultural market access
23 provisions of international trade agreements. This

1 increased market access benefits U.S. exporters and
2 their employees, as well as foreign consumers.

3 I will conclude my remarks at this point and
4 would welcome the opportunity to try to answer any
5 questions you might have.

6 CHAIRPERSON GARZA: That's great. Thank you
7 very much.

8 Commissioner Cannon.

9 COMMISSIONER CANNON: Great. Thanks.

10 Mr. Sullivan, thanks so much for coming
11 today.

12 MR. SULLIVAN: My pleasure.

13 COMMISSIONER CANNON: We appreciate your
14 being here, and the team. I hadn't seen John in a
15 long time, probably 20 years, I bet.

16 I just want to make sure I got an idea of
17 the scope of what we are talking about. The only
18 number I think I saw in your testimony was the 3,000
19 companies that get a benefit. But those aren't all
20 Certificate holders, right?

21 MR. SULLIVAN: No.

22 COMMISSIONER CANNON: Those are companies
23 that are part of a Certificate?

1 MR. SULLIVAN: That's correct.

2 COMMISSIONER CANNON: And so roughly how
3 many Certificate holders are there?

4 MR. SULLIVAN: Roughly 80. I don't have the
5 precise figure off the top of my head. So, you are
6 right, there are 3,000 companies that are covered by
7 Certificates. Each Certificate has a Certificate
8 holder, and then there are members of the group that
9 participate and are covered under the Certificate.

10 COMMISSIONER CANNON: But I assume when a
11 Certificate gets filed, it's not--you have to ability
12 to amend the Certificate?

13 MR. SULLIVAN: Yes.

14 COMMISSIONER CANNON: So people come in and
15 out of this protection?

16 MR. SULLIVAN: Yes. And, in fact, every
17 time a member is added, it is considered an amendment
18 of the Certificate and it is subject to another
19 review by the Departments of Commerce and Justice.

20 COMMISSIONER CANNON: Okay. I got it. And
21 in terms of these are all companies essentially--
22 obviously I assume they are essentially competitors,
23 or there are various folks within a vertical chain

1 or--

2 MR. SULLIVAN: It varies. It's both
3 vertical relationships and horizontal relationships.
4 Most of the companies are small or medium-sized
5 enterprises, although there is no restriction on the
6 size of the entity or the type of entity. It doesn't
7 have to be a trade association. Any person or
8 entity, U.S. person or entity, is eligible to be the
9 Certificate holder.

10 COMMISSIONER CANNON: So there are some
11 trade associations?

12 MR. SULLIVAN: Yes.

13 COMMISSIONER CANNON: So every time a member
14 comes in or out--

15 MR. SULLIVAN: The Certificate is amended,
16 and it is subject to review.

17 COMMISSIONER CANNON: Does that go in like
18 the Federal Register as well or--

19 MR. SULLIVAN: Yes, a Federal Register
20 notice.

21 COMMISSIONER CANNON: I see. Okay. And
22 then every one of these holders, not every one of the
23 3,000 members that take advantage of it, but 80,

1 roughly the 80 holders of Certificates, all file an
2 annual report?

3 MR. SULLIVAN: Yes.

4 COMMISSIONER CANNON: And then that is
5 reviewed as well?

6 MR. SULLIVAN: That is reviewed--that is
7 filed annually, and every time a member is added
8 during the year, not just at the filing of the annual
9 report, but when a member is added, the amendment has
10 to be filed at any time during the year.

11 COMMISSIONER CANNON: As you know, we have
12 got a couple more panels. We are going to do a lot
13 of discussion this afternoon, kind of a broad ranging
14 overview of the whole question of immunities and
15 exemptions, and maybe it is a semantics issue or not,
16 but I notice in your testimony, you said that
17 essentially, this really doesn't qualify, because
18 really it is not an antitrust exemption, but I guess
19 the question is, it certainly is the case that this
20 activity, by virtue of the law and what happens at
21 the Department, is treated differently than other
22 either entities or practices that are subject to
23 antitrust laws--

1 You would, I assume, agree with that?

2 MR. SULLIVAN: To be sure. In fact, we have
3 referred to it--we at the Department of Commerce have
4 referred to it as a limited immunity. It's not an
5 exemption from the antitrust laws because a
6 Certificate can't issue if the export activities
7 would violate the U.S. antitrust laws. We are not
8 exempting anyone from the antitrust laws. On the
9 other hand, there are substantial benefits that are
10 provided to Certificate holders that are pretty well
11 known, and that are substantial, including the
12 presumption that the conduct doesn't violate the
13 antitrust laws in the event a private antitrust suit
14 is filed and payment eligibility for attorneys' fees
15 and costs should a defendant prevail in such a suit.
16 So, there are substantial benefits and changes to the
17 antitrust laws that are provided by this program.

18 COMMISSIONER CANNON: So in a sense they are
19 certainly treated differently--

20 MR. SULLIVAN: Yes. To be sure. To be
21 sure.

22 COMMISSIONER CANNON: Okay. Great. And I
23 guess along those lines, then also when you talk

1 about the fact that there has never been a challenge
2 here, I think we have had people testify on treble
3 damages and other sorts of issues that will impact on
4 this, and the fact that there really hasn't been a
5 successful action or private action--my guess is you
6 will hear people argue, "Well, that's because when
7 you only have single damages, and you face attorneys'
8 fees if you are not successful, you know, that would
9 probably have some sort of a disincentive to bring
10 cases like that."

11 MR. SULLIVAN: I can't disagree with that,
12 but I think the most substantial reason is that the
13 Certificate and the activities that are engaged in
14 are subject to substantial review by the Commerce
15 Department and by the Justice Department's Antitrust
16 Division--economists and antitrust lawyers--looking
17 at it. And there is a substantial number of
18 Certificates that are not granted as originally
19 requested. We don't deny many Certificates; usually
20 they are withdrawn--the applications are withdrawn.
21 But, by the time it has gone through that process,
22 all the lawyers have looked at it, and terms and
23 conditions have been imposed, it's very unlikely that

1 such conduct would be subject to a successful
2 challenge in court.

3 COMMISSIONER CANNON: And one thing I did
4 notice, that in the back--is the question of how much
5 all this costs the department. It looked like you
6 were saying there were three part-time professionals
7 that do this. And how does that really relate to
8 what the legal team may do in the GC's office or the
9 Justice Department?

10 MR. SULLIVAN: Sure. Right now--

11 COMMISSIONER CANNON: That's not that many
12 people to administer a pretty big program.

13 MR. SULLIVAN: Right. But, the number of
14 Certificates, as we discussed previously, is
15 relatively small. It's fewer than 100. It's not a
16 full-time occupation for the three professionals, but
17 it is a substantial amount of their time, plus they
18 have the benefit of John Masterson's counsel and the
19 lawyers in the general counsel's office, and there is
20 a similar commitment by the Justice Department as
21 well.

22 So it is not a substantial commitment of
23 resources by the Department of Commerce, but it

1 provides a pretty significant benefit of anywhere
2 from, we believe, \$10 to \$15 billion worth of exports
3 as a result.

4 COMMISSIONER CANNON: In sales. I'm over my
5 time. I apologize. Madam Chair.

6 CHAIRPERSON GARZA: Thank you. Commissioner
7 Kempf?

8 COMMISSIONER KEMPF: Let me start where
9 Steve started, and that is on the amount of these.
10 You said you had roughly 80, somewhere in that, per
11 year covering a commerce of \$10 billion on 3,000
12 companies.

13 What about in terms of new ones each year?
14 How many new ones were there last year and this year,
15 for example?

16 MR. SULLIVAN: Well, I couldn't tell you off
17 the top of my head. Jeffrey, how many Certificates
18 last year?

19 MR. ANSPACHER: New Certificates including--

20 COMMISSIONER KEMPF: I don't know. I'm not
21 including amendments.

22 MR. ANSPACHER: Well, amendments are
23 essentially new, because--

1 MR. SULLIVAN: They are treated as new
2 Certificates and--

3 COMMISSIONER KEMPF: I understand that, and
4 that's why I am excluding them.

5 MR. ANSPACHER: We average about six or
6 seven a year usually, brand new ones, and we average
7 probably close to 20 amendments a year.

8 COMMISSIONER KEMPF: Okay. Just so my
9 perspective--I'm not sure I care one way or the other
10 whether we keep or jettison this one. As I read the
11 submissions and listen to the testimony, I hear two
12 different strains.

13 Your piece, for example, Mr. Sullivan, says,
14 you know, it's really not an exemption, because it
15 covers activity that doesn't apply--covers foreign
16 commerce, and that's not covered, anyway.

17 But that also translates into, well, if it
18 doesn't cover, you don't need it.

19 On the other side of the coin, I sort of
20 say, "well, if it only applies to stuff that's not
21 covered by the antitrust laws, what harm is there in
22 having it?"

23 So I'm sort of a bit ambivalent about it.

1 But I did find some of the stuff in your paper sort
2 of troubling. Throughout you talk about, you know,
3 "Gee, it's a way small firms can get together and do
4 stuff where they might--where each standing alone
5 lacks the resources to do," and you refer to, for
6 example, negotiating lower freight rates.

7 But Title III is available to big companies
8 with vast resources, and they can use it not just to
9 negotiate lower shipping costs, but also to establish
10 higher prices. Isn't that right?

11 MR. SULLIVAN: In theory, but higher prices
12 would preclude the Certificate from being issued.

13 COMMISSIONER KEMPF: Why?

14 MR. SULLIVAN: It's precluded by the
15 statute. Title III precludes the Certificate from
16 being issued if it would have any effect basically
17 on--any effect on prices in the United States.

18 COMMISSIONER KEMPF: No, no, no, I'm talking
19 about prices overseas. I'm not talking about--

20 MR. SULLIVAN: Prices overseas, beyond the
21 jurisdiction of the U.S. antitrust laws, would be
22 subject to regulation by foreign antitrust
23 regulators.

1 COMMISSIONER KEMPF: Correct, but under this
2 Title III, six of the 10 largest corporations in
3 America, with vast resources, could get together and
4 establish higher prices--assuming they meet all the
5 provisions of the Title--higher prices some place
6 else, in Bolivia or Bulgaria.

7 MR. SULLIVAN: Right, with no effect in the
8 United States.

9 COMMISSIONER KEMPF: Correct.

10 MR. SULLIVAN: And subject to foreign
11 antitrust regulation.

12 COMMISSIONER KEMPF: Okay. The reason I--
13 well, let me go back, I suppose, to where I am. Can
14 we get a list of who the 3,000 companies are? I
15 assume that's public information.

16 MR. SULLIVAN: Sure, it's all publicly
17 available.

18 COMMISSIONER KEMPF: Your thing is
19 transparency.

20 But is it--are the 3,000 companies
21 predominantly ma-and-pa operations or are they--

22 MR. SULLIVAN: The vast majority are small
23 and medium-sized enterprises. Larger--large

1 enterprises that have high market concentration are
2 not going to be able to survive the type of scrutiny
3 that Certificate applications go through to prove
4 that there is no effect on U.S. markets or consumers
5 or U.S. prices.

6 And, as a result, then the vast majority of
7 the Certificate holders are small and medium-sized
8 companies--you know, apple growers.

9 COMMISSIONER KEMPF: Let me turn and ask you
10 about a question that is over on page 9 of your
11 written testimony. It says that Certificates do not
12 promote the formation of hard-core cartels seeking to
13 exploit market power to the disadvantage of
14 consumers, and we are talking about foreign
15 consumers, not American consumers.

16 Why do you say that? I mean that's--that
17 sounds good, but what is the evidence?

18 MR. SULLIVAN: Well, the basis for that is
19 that the--the principle underlying it is that we are
20 actually promoting competition in foreign markets by
21 having market entry by exporters here in the United
22 States that otherwise, because of their small size
23 and the barriers to foreign trade, wouldn't be

1 participating in those foreign markets.

2 The other thing I will say is that there is
3 a standard term that is included in Certificates that
4 preclude the Certificate holders from restricting
5 output. So there are restrictions on both
6 information that can be shared by members that are
7 participating in an export joint venture under their
8 Certificate, and there are provisions that preclude
9 restrictions on output or exports outside of the
10 Certificate by participating members.

11 COMMISSIONER KEMPF: Madam Chair, I have one
12 other question I would like to ask.

13 CHAIRPERSON GARZA: Yes, go ahead.

14 COMMISSIONER KEMPF: The--as I said at the
15 outset, I am not sure I care one way or the other
16 whether this is maintained or jettisoned because of
17 the arguments on each side. You say we should keep
18 it, but your paper convinces me that you don't need
19 it, and those who are opposing it, their arguments
20 sort of persuade me that it doesn't hurt to have it.

21 MR. SULLIVAN: Right.

22 COMMISSIONER KEMPF: So my question is this,
23 because I sense among my colleagues some sentiment to

1 jettisoning it, and the question I have is, do you
2 have any comment whether, if we should jettison it,
3 whether there should be some grandfathering of
4 existing certified--in other words, address the issue
5 of if we decide to jettison it, which I understand
6 you are opposed to, what we should consider doing so
7 that we don't have unintended damage in the wake?

8 MR. SULLIVAN: Right. Let me make two
9 points; first, if the program were to be
10 discontinued, I think it would--as a matter of
11 fairness for entities that had made substantial
12 investments in export trading activities on the basis
13 of having a Certificate--that those expectations not
14 be dashed, and that we continue to allow the exports
15 under those Certificates.

16 But let me add a comment regarding the
17 premise: that there is--we don't need this program
18 and that we don't--that we shouldn't care whether the
19 program exists. It actually does provide a
20 substantial benefit to small companies--agricultural
21 producers, for example--and I think there are a
22 number of comments that have been received by the
23 Commission from them: agricultural producers, apple

1 growers, farmers that produce pistachios, that aren't
2 able on their own to market their agricultural
3 products, that are able to combine to reduce costs
4 and to make their exports without being subject to
5 the threat of treble damages and having to hire
6 expensive antitrust counsel and economists. Getting
7 that conduct pre-cleared by the Justice Department
8 and by the Commerce Department--being able to engage
9 in that export activity--provides a substantial
10 benefit to them.

11 We also think there is a benefit in trade
12 agreements that are being negotiated by the United
13 States which have tariff rate quota provisions, which
14 has caused the United States Trade Representative,
15 Ambassador Portman, to say that this is an important
16 tool in being able to implement those types of
17 foreign trade agreements, allowing, for example,
18 agricultural producers--we just had experience with
19 CAFTA chicken producers that will be able to export
20 chicken products to the CAFTA countries--to take
21 advantage of tariff rate quotas that have been
22 implemented under CAFTA.

23 So, I think there are substantial benefits

1 to the program, and we would hope that it would
2 continue.

3 COMMISSIONER KEMPF: Thank you very much.

4 CHAIRPERSON GARZA: Thank you.

5 MR. SULLIVAN: You are welcome.

6 CHAIRPERSON GARZA: Commissioner Litvack.

7 COMMISSIONER LITVACK: Thank you. As I
8 think I recall, Mr. Sullivan, at the time that this
9 Act was passed, it was passed really because we felt
10 that our domestic companies were being disadvantaged
11 in export trade because other countries were doing
12 this. They were allowing it. Is that correct?

13 MR. SULLIVAN: That was one of the reasons,
14 I believe. I think there were high expectations that
15 the program was going to do probably more than it was
16 capable of doing. But that was certainly one--

17 COMMISSIONER LITVACK: There were very high
18 expectations, you are quite correct, which probably
19 have not been realized. But I guess my question was
20 going to be, therefore, if other countries did away
21 with this kind of cartel protection, would you favor
22 the U.S. doing away with it?

23 MR. SULLIVAN: Well, I think I would have to

1 disagree with the use of the pejorative "cartel
2 protection." We would characterize it as an export
3 joint venture that is not subject to U.S. antitrust
4 laws but would be subject to a foreign country's
5 antitrust laws.

6 So, for example, if the exporters were
7 violating the antitrust laws of The Netherlands by
8 exporting apples there in a way that violated Dutch
9 antitrust laws, we have no basis to say that they are
10 immune from liability under Dutch law.

11 So, I think the system that we are hoping
12 for is a system under which each country would have
13 its antitrust laws apply to its own domestic markets
14 through a transparent process like the one that we
15 have. These types of export joint ventures, which
16 are matters of public record--people know what the
17 exporters are doing--that those export activities are
18 then subject to foreign countries' antitrust laws.

19 We just met, John and I, with a Chinese
20 delegation, and China, we hope, is on the verge of
21 adopting an antimonopoly law, and so, exporters
22 exporting to China would be subject to, we hope in
23 the next year or two, Chinese antitrust laws.

1 COMMISSIONER LITVACK: That should be
2 interesting.

3 (Laughter.)

4 CHAIRPERSON GARZA: Better worry about what
5 you hope for.

6 COMMISSIONER LITVACK: Someone once told me
7 that Chinese antitrust law is an oxymoron, but we'll
8 put that aside for a moment.

9 I have a paper here, which has been made
10 available to us, written in 1991--I realize that is
11 obviously 14 years ago--by Paul Victor in which he
12 says--and I don't know what he's talking about--
13 "Studies conducted by the U.S. Department of Justice,
14 the Federal Trade Commission, and the Organization
15 for Economic Cooperation and Development have all
16 found that export cartels"--and I think he includes
17 what you are talking about as such--"primarily
18 benefit large firms, tend to facilitate
19 anticompetitive practices in domestic markets, and
20 create and maintain trade barriers."

21 That's the end of the quote.

22 I guess my question to you is, if the
23 Department of Justice is cooperating with you in this

1 effort and reviewing these things, why and how, and
2 is it true, that they have done studies that have all
3 found this to benefit large firms and be
4 anticompetitive?

5 MR. SULLIVAN: I have never seen such a
6 study. I'm not aware of any such study. And, in
7 fact, I think the public record will demonstrate--and
8 we'll be happy to produce the list of 3,000 members
9 who are covered by the fewer than 100 Certificates--
10 will demonstrate that the vast majority are small and
11 medium-sized enterprises.

12 The fact that--if that were the case, as
13 this article describes, I think there would probably
14 be a better--there would probably be at least one
15 Certificate that had been successfully challenged on
16 antitrust grounds even if the plaintiff wasn't going
17 to get treble damages.

18 COMMISSIONER LITVACK: That leads me to one
19 last question, which is, is the ultimate benefit or
20 purpose of this and the ultimate reason for it in
21 some ways our private antitrust laws? Because if in
22 fact the conduct doesn't violate the U.S. antitrust
23 laws and apparently doesn't violate the Chinese

1 antitrust laws or the Bulgarian antitrust laws, then
2 what do we need this for? It's not violating
3 anybody's laws. It's just like setting up something
4 in the Commerce Department for administrative
5 purposes.

6 MR. SULLIVAN: Well, it's part of a larger
7 effort by the Department of Commerce to encourage
8 export trade, and, as we discussed just a few minutes
9 ago, I think the hopes and expectations for this
10 program may have been somewhat overstated in 1982.
11 Our focus is more on small and medium-sized
12 businesses. You know, \$10 or \$15 billion--I used to
13 work at the Defense Department, so that--you know,
14 it's a lot of money to me personally, but \$10 or \$15
15 billion is not a huge export program, but we think it
16 is an important one, and it is part of--it is just a
17 tool that we are using to encourage exports, part of
18 a larger program that Jeffrey is involved in is the
19 International Trade Administration.

20 COMMISSIONER LITVACK: One last comment, and
21 as you say, the hopes for the program may have been a
22 little high at the beginning. I recall, at the time,
23 one critic shortly afterwards saying, when Secretary

1 Baldridge was there, he had announced that it would
2 end up with the creation of 100,000 new jobs and
3 someone said "that's true, but they're all in the
4 Department of Commerce."

5 (Laughter.)

6 MR. SULLIVAN: We only succeeded in one--
7 well, two and a half, I guess: three half-time and
8 one full-time. So, it didn't quite make it.

9 COMMISSIONER LITVACK: You're a little short
10 even there. Right?

11 MR. SULLIVAN: It didn't quite meet
12 expectations.

13 (Laughter.)

14 COMMISSIONER LITVACK: Thank you, Madam
15 Chair.

16 CHAIRPERSON GARZA: Commissioner Valentine.

17 COMMISSIONER VALENTINE: Good afternoon, Mr.
18 Sullivan.

19 I want to follow up on something you just
20 almost finished off with, which is that \$10 billion
21 is not that much in terms of U.S. global trade. What
22 is the statistic for the years 2001 and subsequently
23 of annual global U.S. export trade in goods and

1 services?

2 MR. SULLIVAN: We would have to get back to
3 you with that. I couldn't tell you off the top of my
4 head, but this is just a minuscule fraction of that.

5 COMMISSIONER VALENTINE: That's what I
6 thought. Okay, thank you.

7 I would actually very much like to save you
8 your three part-time professionals and your one full-
9 time administrative staff, and suggest that if your
10 program functions exactly as you say it does, it is a
11 very wonderful program that is absolutely not needed
12 at all, that all of these are joint ventures, they
13 are totally legal, they involve small firms with no
14 market power, sharing marketing expenses and
15 distribution costs, costs associated with analyzing
16 trade information--I couldn't agree with you more,
17 this all sounds like wonderful activity and it is
18 great that we encourage it. But we need absolutely--
19 and I will say this speaking as a former federal
20 antitrust enforcer--absolutely no exemption from the
21 laws, no protection from the laws.

22 And as you yourself say, since this only
23 affects non-U.S. commerce, and you have guaranteed us

1 that it is actually not involving U.S. trade at all--
2 that is, since the U.S. antitrust laws address only
3 effects on U.S. commerce, and since your export
4 activities are affecting only foreign commerce, you
5 need absolutely no exemption.

6 So I guess what I would like to suggest is
7 that the one thing that these firms may need would be
8 actually foreign antitrust advice, and the reason I
9 would like to suggest this is that, if in fact these
10 Export Trade Associations Organization activities
11 were to have an adverse effect anywhere, it would be
12 overseas.

13 As you know, our Justice Department operates
14 an extremely effective, an extremely effective cartel
15 enforcement program. As you may also know or not
16 know, the Justice Department is constantly seeking
17 cooperation from other foreign enforcers to help them
18 enforce against cartel activities. And when we have
19 cartels that affect our consumers, we ask the
20 Europeans, we ask the Japanese, we ask the Canadians
21 and the Germans to help us prosecute against these
22 activities. And they often do so. And the UK is
23 possibly going to be extraditing one of its

1 nationals, and that person will be spending time in
2 prison here.

3 Now I think the one question I want to ask
4 you is, if you--if we were to suggest that the U.S.
5 go forward on efforts by all countries to repeal
6 similar laws in all countries that seek to protect
7 export activities that may or may not hurt
8 foreigners, and if all other countries were to
9 promise to help each other were there to be adverse
10 effects overseas--let's say there's an adverse effect
11 of one of these apple cartels in Japan or in France--
12 I don't mean to keep calling them cartels. You can
13 call them export associations--and the head of the
14 JFTC and the head of the French Competition Council
15 requested help from the Assistant Attorney General of
16 the Department of Justice, would you be happy to let
17 the Department of Justice help in prosecuting against
18 the adverse effects of that association overseas?

19 MR. SULLIVAN: Well, in fact, I think we
20 would say that cooperation would be provided even
21 under the current system to the extent it is
22 permitted. There are some statutory protections for
23 some of the information that is provided in support

1 of the application, but, assuming there aren't
2 statutory bars on providing information, we would be
3 in favor of cooperation with foreign antitrust
4 regulators.

5 Our position is that we think our program--
6 first of all, we think it does provide substantial
7 benefits to these small and medium-sized enterprises,
8 and that it has new uses in these trade agreements
9 that are being negotiated. But we think our program,
10 which provides for public notice and an opportunity
11 for comment by parties, including foreign governments
12 who have commented on proposed Export Trading Company
13 Certificates of Review--we think that is preferable
14 to a system under which there is just implicit
15 antitrust authorization through foreign laws--or our
16 own laws--that would limit antitrust coverage.

17 I think we would prefer to have a system
18 like ours where there is review, public comment, and
19 assurances provided to small and medium-sized
20 companies that may be reluctant to engage in export
21 activities but for the protections that are provided
22 by the statute.

23 COMMISSIONER VALENTINE: I won't comment on

1 an oxymoron.

2 Thank you, sir.

3 MR. SULLIVAN: You are welcome.

4 CHAIRPERSON GARZA: Okay. Commissioner
5 Yarowsky.

6 COMMISSIONER YAROWSKY: Yes. Thanks for
7 coming, all of you.

8 I just want to know a little bit more about
9 the operation, kind of functional operation.

10 I take it that when someone makes an
11 application for a Certificate, they disclose the
12 nature and scope of their activities.

13 MR. SULLIVAN: Yes.

14 COMMISSIONER YAROWSKY: If it is a new
15 application, it would be also the membership of that
16 group. Now if the scope or nature of their
17 activities changes, is that when they are required to
18 file an amendment?

19 MR. SULLIVAN: Yes, any of their activities--
20 --the Certificate would list the export trade
21 activities that they are proposing to undertake.
22 Members of the organization--changes to any of that
23 would require an amendment--

1 COMMISSIONER YAROWSKY: Okay.

2 MR. SULLIVAN: Which is treated as a new
3 Certificate application.

4 COMMISSIONER YAROWSKY: And is there a time-
5 limited period for this review, both at the Commerce
6 and Justice?

7 MR. SULLIVAN: Yes. Yes, there is. It's
8 generally 90 days. It's subject to extension. There
9 is also a provision for expedited review, but there
10 are time limits.

11 COMMISSIONER YAROWSKY: And then, as
12 Commissioner Cannon said, you publish it in the
13 Federal Register so that there is public notice?

14 MR. SULLIVAN: The application itself is
15 published when it is first filed, and then the final
16 disposition--

17 COMMISSIONER YAROWSKY: Okay. And so if
18 someone wanted to challenge the activity that is in
19 there, they would have to say that the participant
20 were acting outside the scope of their disclosure?
21 Would treble damages lie if a lawsuit was brought
22 against a participant, and it was alleged that the
23 conduct that they were going after was outside the

1 scope of the disclosure?

2 MR. SULLIVAN: Yes, if it is outside the
3 scope of the Certificate, then the protections
4 provided by the statute and the program wouldn't
5 attach.

6 COMMISSIONER YAROWSKY: Okay. Now you
7 mentioned the process of revocation. Has there ever
8 been a revocation, and what would be the reason for
9 that?

10 MR. SULLIVAN: There have been a number of
11 revocations--revocations and amendments--that have
12 been required by the government. For example, if a
13 party doesn't file an annual report, the Certificate
14 is revoked.

15 COMMISSIONER YAROWSKY: Okay. So if there
16 are procedural lapses--

17 MR. SULLIVAN: Well, procedural lapses, and
18 we have received complaints even after the statute of
19 limitations has passed for challenging the
20 Certificate. If there have been changes in market
21 conditions--not changes in the export trading
22 activities of the Certificate holder, but just
23 changes in market conditions, we have received

1 complaints from parties suggesting that we look again
2 at the Certificate, and we are always open to those
3 types of suggestions, and the Certificate holders
4 know that they are subject to our continuous review,
5 and we will always be looking to see if things have
6 changed and the Certificate should be amended or
7 revoked.

8 COMMISSIONER YAROWSKY: Okay. Now are you
9 aware of any complaints received from other
10 countries?

11 MR. SULLIVAN: I am not aware of any.

12 COMMISSIONER YAROWSKY: Of the operation of
13 these--

14 MR. SULLIVAN: I believe in his confirmation
15 hearing, Ambassador Portman testified that USTR is
16 not aware of any, either. I'm not aware of any.

17 COMMISSIONER YAROWSKY: Okay, because one
18 question I have, and this is also an issue of
19 controversy, is that thus far antitrust really hasn't
20 been subject to trade negotiations, World Trade
21 Organization trade negotiations. I think there would
22 be a lot of resistance in this country to throwing up
23 the antitrust laws--I'm not trying to be polemical

1 now--to that kind of thing, even though we hope to
2 see the expansion of antitrust enforcement.

3 My question simply is, if there is pushback
4 or resistance or even distress about what we are
5 doing in this country, this could be one reason that
6 other countries could agitate to try to put antitrust
7 as part of the trade agenda talks.

8 MR. SULLIVAN: Well, I just add as an
9 observation that a number of the--this program has
10 been the subject of, and has been provided for, in
11 several of our recent trade agreements and
12 negotiations. For example, the recently negotiated
13 CAFTA agreement specifically provided for Export
14 Trade Certificates, and we have an export trade--

15 COMMISSIONER YAROWSKY: So there is a
16 reciprocal policy in CAFTA?

17 MR. SULLIVAN: Yes. And we have, in fact,
18 an association that is providing for export of
19 chickens and chicken parts to the Central American
20 countries and the Dominican Republic.

21 COMMISSIONER YAROWSKY: More than you ever
22 wanted to say here.

23 Last question, quickly. I mean this

1 seriously. Is there any set of circumstances by
2 which if you looked around in the relations with
3 those small companies--I know they need the
4 perception of certainty. That's what I'm picking up.
5 That they wouldn't participate or export for fear
6 that joint activity might subject them to antitrust
7 liability. Is there any set of circumstances that
8 you would foresee that would then make this program
9 unnecessary?

10 I mean, what would be the state of the
11 economy, world economy, our economy, or trade
12 situation where you would say, just simply, "It's
13 served its purpose, but we don't need it anymore?"

14 MR. SULLIVAN: Well, if we were fully
15 satisfied with the level of exports, which I'm not
16 sure we would ever be politically--but, I mean, there
17 will always be, I believe, smaller organizations that
18 face substantial burdens in--if they want to get, for
19 example, a law firm opinion that the conduct that
20 they are proposing to engage in wouldn't violate the
21 antitrust laws, it's a substantial expense to hire
22 McDermott, Will & Emery and economists and have Bobby
23 Burchfield opine that your conduct isn't violating

1 the antitrust laws. So--

2 COMMISSIONER YAROWSKY: All right. So you
3 just see it going on for a long time?

4 MR. SULLIVAN: I think so.

5 COMMISSIONER YAROWSKY: Okay.

6 CHAIRPERSON GARZA: Commissioner Burchfield,
7 maybe you will offer to lower your rates in exchange
8 for--

9 COMMISSIONER BURCHFIELD: Thanks, I think.

10 It seems to me--I have two questions. The
11 first question, as sometimes happens in this
12 environment, will take a minute to set up.

13 A lot of what we have talked about on this
14 Commission, and a lot of what the witnesses have
15 talked about to us on this Commission, is
16 overdeterrence of the antitrust laws. Situations
17 that really are competitive but that the market
18 actors are deterred from engaging in because they,
19 for whatever reason, believe that there is antitrust
20 risk. It can be, in the case of a small apple
21 grower, just a misperception about what the antitrust
22 laws provide. It can be a misperception about
23 whether the antitrust laws even apply to conduct

1 beyond the borders of the United States.

2 It seems to me that the case for this
3 particular process, this statutory scheme, is that it
4 provides comfort to companies that might not
5 otherwise--that might otherwise be deterred from
6 engaging in legitimate competitive activity by
7 misperceptions about the antitrust laws or the threat
8 of antitrust litigation that might not be well
9 founded.

10 And if that premise were true, that those
11 companies, as a result of this program, undertake
12 export activity that has good competitive
13 significance and good benefits to the nation, to the
14 commerce of the nation, that they would not otherwise
15 undertake.

16 Could you address that, and in particular,
17 Mr. Sullivan, give us any information that you have
18 at your disposal--I'm sure the Commerce Department
19 takes this sort of thing--of companies, entities that
20 perhaps are more actively engaged in export activity
21 as a result of this program than they would be if
22 this program did not exist?

23 MR. SULLIVAN: To address the first part of

1 your question, I think there are substantial burdens
2 that are faced by small businesses seeking to export:
3 not having the wherewithal to overcome the costs and
4 the burdens of exporting abroad, seeking to come
5 together with other similarly situated entities, and
6 facing the risk of a treble-damages antitrust suit.
7 To lessen that risk, there is a substantial cost that
8 is incurred. And, I said it in jest before, but it's
9 a serious cost to reduce that risk, to get an opinion
10 letter from a law firm or from--to provide the type
11 of assurance that a business would need before
12 venturing -- even if it's conduct that would be--that
13 we would think was clearly not covered by the
14 antitrust laws, it is a substantial risk for a
15 business to risk treble damages liability and
16 substantial attorneys fees. The Commerce Department--
17 this program provides that type of assurance to a
18 small business at very little cost to them, and,
19 frankly, at very little cost to us, given the scale
20 of the Department and our export-promoting activities
21 generally.

22 To get to the second part of your question,
23 my experience is that--our experience is that there

1 are a wide variety of small businesses, and they are
2 not just commodity exporters: they are agricultural
3 associations--apples, pistachios, cherries--but
4 services, as well, like engineering services.

5 So, it is a pretty wide variety of
6 businesses and partnerships and organizations that
7 are involved, and I think it would be useful for us
8 to provide you with a list of the 3,000 to give you a
9 sense of the types of businesses that are benefiting
10 from this and the scope of their activities.

11 COMMISSIONER BURCHFIELD: We would also be
12 interested in seeing, I think, if there is any
13 internal analysis that you are able to share with us
14 on how this program has in fact enhanced the growth
15 of exports as opposed to just serving as a comfort
16 blanket for companies that might have already engaged
17 in the exporting.

18 MR. SULLIVAN: Yes.

19 COMMISSIONER BURCHFIELD: My other for you,
20 which is a fairly straightforward one, I think, is, I
21 know you are not here to speak for the Department of
22 Justice, but are you aware of any instances in which
23 the Department of Justice in an official way has

1 either opposed or supported this program as either
2 consistent with or inconsistent with the antitrust
3 enforcement policies of the country?

4 MR. SULLIVAN: I am not aware of the Justice
5 Department taking any position in opposition to this
6 program. I know that it has been suggested, I
7 believe, in a letter from the former Assistant
8 Attorney General, that it be looked at. But, I don't
9 believe the Justice Department has taken a position,
10 nor has--I know the Administration has not taken a
11 position in opposition to this program.

12 MR. MASTERSTON: In fact, as I recall, in
13 the two most recent editions of the International
14 Guidelines, the Department of Justice and the FTC, in
15 the case of the most recent edition, cite with
16 approval the Export Trading Company Guidelines that
17 were issued in 1985 by Commerce and Justice. So to
18 that extent, you have an ongoing affirmation by the
19 Antitrust Division of the Department of Justice that
20 the principles under which the two Departments issue
21 Certificates of Review are still valid.

22 MR. SULLIVAN: And the President's Trade
23 Representative, Ambassador Portman, strongly endorsed

1 the program earlier this year.

2 COMMISSIONER BURCHFIELD: Thank you.

3 CHAIRPERSON GARZA: We are close to our
4 time, so if you can stay a few more minutes--

5 MR. SULLIVAN: I'll be happy to.

6 CHAIRPERSON GARZA: I just have one very
7 quick question. Most of them actually have been
8 asked by my colleagues.

9 The one thing I will ask is, one of the
10 concerns I have heard expressed is that, while we can
11 be sympathetic to the goals of the program with
12 respect to the small and medium-sized enterprises
13 that really need to cooperate in order to take
14 advantage of certain scale efficiencies or to be
15 effective exporters, some people have raised a
16 concern about, well, what if what you had is
17 actually, you know, all of the or nearly all of the
18 U.S.-based international oil companies or nearly all
19 the U.S.-based international chemical companies who
20 obtained an Export Trade Certificate. They don't
21 really need that in order to be effective exporters,
22 but somehow or other they may use it as a shield for
23 what we might think of as more traditional cartel

1 activity, albeit aimed at foreign markets, and so in
2 that sense, if nothing else, it sends a bad message
3 in terms of our--what we believe should be happening
4 in the world of antitrust enforcement.

5 Do you have any doubt as to whether the
6 Justice Department would approve or disapprove an
7 application for a Certificate in that event? And is
8 there any entitlement that companies would have so
9 long as they could establish that there wasn't any
10 effect on U.S. commerce, any entitlement that they
11 would have to a Certificate?

12 MR. SULLIVAN: There is a provision for
13 judicial review for denial of a Certificate, so, if a
14 Certificate were denied--it has never been
15 successfully pursued--but, if a Certificate were
16 denied, the Certificate applicant could seek judicial
17 relief and, under, I guess the APA, seek to have the
18 denial reversed or at least sent back for
19 reconsideration.

20 I would think in the hypothetical you just
21 described that not only the Justice Department but
22 also the Commerce Department would be exceptionally
23 skeptical of any such an arrangement given the--if

1 there is substantial concentration in the domestic
2 market in particular.

3 If there were such an arrangement proposed--
4 the Commerce Department and the Justice Department,
5 in looking at these types of applications, apply the
6 Merger Guidelines, and, if there were such a
7 Certificate or application proposed, I would be very
8 skeptical that it would be approved.

9 CHAIRPERSON GARZA: Okay. Thank you.
10 Commissioner Jacobson.

11 COMMISSIONER JACOBSON: Thank you. Mr.
12 Sullivan, thank you very much for your time. I do
13 have a couple of questions.

14 One is just a technical one. Are there any
15 policy considerations that are different in our
16 assessment of ETCs as opposed to the Webb-Pomerene
17 associations? Should the analysis be different when
18 we are looking at Webb-Pomerene as opposed to the
19 Export Trading Company Act?

20 MR. SULLIVAN: You know, the Webb-Pomerene
21 Act is a much narrower scope than the ETCA. The ETCA
22 was passed decades later and is much broader in
23 scope. Webb-Pomerene is limited to export

1 associations, and so it's--we think it provides
2 useful benefits, but it's not a statute that we
3 administer, and it's substantially different and
4 narrower in scope.

5 COMMISSIONER JACOBSON: As I understand your
6 paper and your testimony, there is no risk that an
7 Export Trading Company with a Certificate would
8 engage in any conduct that would increase prices or
9 restrict output to U.S. consumers. Is that a fair
10 summary of what you said?

11 MR. SULLIVAN: Yeah, it's precluded by
12 statute. Title III, the statute itself, provides
13 that a Certificate can't issue if the effect would be
14 to increase prices in the United States, or affect
15 competition in the United States.

16 So, if we make a mistake, you know, we are
17 subject to being corrected, but, by statute, we are
18 not allowed to issue a Certificate if there would be
19 such an effect.

20 COMMISSIONER JACOBSON: So from what is
21 there a limited immunity that has a positive value?

22 MR. SULLIVAN: The positive value is the
23 limited immunity from private antitrust suits. The

1 Certificate will, in effect, provide almost complete
2 assurance that, so long as the Certificate holders
3 engage in conduct within the four corners of the
4 Certificate, they won't be prosecuted and there won't
5 be a civil action by the United States.

6 The principal benefit to the Certificate
7 holders is in the private antitrust field where there
8 are substantial benefits to them like detrebling and
9 provision for attorneys' fees if the defendant
10 prevails in an antitrust suit. So, I think, as Mr.
11 Burchfield mentioned before, one of the principle
12 concerns--and risks--that the small businesses in
13 particular have expressed to us is the threat of
14 treble damages.

15 COMMISSIONER JACOBSON: No, I understand
16 that, and I have got limited time, so I'm just going
17 to try to be crisp with this.

18 A private action against conduct that has
19 been approved and granted an Export Trading Company
20 Certificate perforce should lose precisely because
21 there is no adverse effect on U.S. competition.
22 Isn't that fair to say?

23 MR. SULLIVAN: By definition.

1 COMMISSIONER JACOBSON: All right. So what
2 we are talking about is protection from civil
3 antitrust cases that would have no basis.

4 MR. SULLIVAN: In theory.

5 COMMISSIONER JACOBSON: Okay. So why is
6 that justification not applicable to every company in
7 the U.S. economy?

8 MR. SULLIVAN: Well, I said in theory. In
9 theory, it should be. There have been suits brought--
10 -not successfully, but there have been suits brought
11 and the threat of suits is what the statute is
12 designed to allay the risk--

13 COMMISSIONER JACOBSON: No, I understand
14 that, but I have the honor and privilege of defending
15 some of the most frivolous cases you will ever see,
16 but we don't have an Export Trading Company
17 Certificate as a defense. We are still going to win
18 the case, but my question is, what is the difference--
19 -

20 MR. SULLIVAN: Your clients probably have
21 the resources to defend that case reasonably without
22 being driven out of business and paying just for the
23 defense.

1 COMMISSIONER JACOBSON: Not always, and I
2 would suggest--

3 MR. SULLIVAN: Often enough.

4 COMMISSIONER JACOBSON: --I would suggest
5 that, although I know McDermott, Will & Emery's rates
6 are reasonable and fair--

7 (Laughter.)

8 COMMISSIONER JACOBSON: --and those of
9 economists are, too, that the cost of getting a
10 Certificate in each case is not appreciably different
11 than the 1-in-200 chance that you may have to defend
12 a lawsuit.

13 In any event, my time has expired. I think
14 you understand the skepticism that I have. I just
15 don't see the difference between ETCs and General
16 Motors.

17 CHAIRPERSON GARZA: Well, even though the
18 yellow light is still on--

19 COMMISSIONER VALENTINE: Could I ask for
20 just one revision of Bobby's request to them to be
21 sure we get the data accurately?

22 CHAIRPERSON GARZA: Okay. What we will do,
23 though, is just to be--it's best to follow it up with

1 something in writing or have the staff follow up with
2 a written request.

3 COMMISSIONER VALENTINE: Okay. Because what
4 I would like is to just have the data sorted or
5 divided. To the extent that they want to show that
6 this Act is in fact increasing exports and making a
7 material difference, I would like any evidence with
8 respect to the TRQs, the tariff-rate quotas, separate
9 from the actual supposed benefits to the associations
10 that get the Certificates.

11 CHAIRPERSON GARZA: What we will do, just
12 for clarity, is, after the hearing we will follow up
13 with staff and get to you, Mr. Sullivan, what we
14 would ideally like to see.

15 Thank you. I would rather conclude the
16 hearing right now so we can--all right, thank you
17 very much, Mr. Sullivan. And as you can see, it is
18 likely that we will have some continuing interaction.
19 There may be some additional information or questions
20 we would like to put to you. But I appreciate your
21 written testimony and I appreciate your presence here
22 today.

23 MR. SULLIVAN: Thank you. We would be

1 delighted to respond to any questions you might have.

2 CHAIRPERSON GARZA: All right. Thank you.

3 MR. HEIMERT: We will take a brief break and
4 begin the next panel momentarily.

5 (Recess.)

6 CHAIRPERSON GARZA: Welcome to the second
7 panel of the AMC's hearings on immunities and
8 exemptions this afternoon. This panel will consist
9 of Professor Darren Bush and Gregory Leonard, who
10 will make a presentation on work that they did in
11 proposing a framework for assessing immunities and
12 exemptions.

13 Gentlemen, I appreciate your appearing
14 today; I appreciate the work that you have done. We
15 are going to go until 2:40, and then take a break for
16 the next panel.

17 If I could ask you both to make each about a
18 five-minute statement, sort of summarizing what you
19 have to say, and then we are going to have
20 questioning by two or three Commissioners after that,
21 as time permits.

22 So, gentlemen, if you could. Mr. Leonard,
23 if you like to start. Would you prefer to start?

1 Whichever.

2 MR. LEONARD: I'll go first. I want to
3 thank the Commission for giving me the opportunity to
4 speak today about the framework that Darren, Steve
5 Ross, and I developed for analyzing antitrust
6 immunities and exemptions.

7 I thought I would focus on the choice of
8 benefit-cost analysis as the analytical tool to use
9 in assessing whether an exemption or immunity should
10 be granted or continued.

11 Darren is going to cover some of the other
12 issues that we addressed in the framework.

13 Well, almost anyone who has made any kind of
14 personal decision has engaged in some kind of
15 informal cost-benefit analysis. When I decided to
16 walk over here today, I thought, well, if I walk
17 over, I'm going to use up some calories, and it's not
18 going to cost me as much as a taxi would.

19 Unfortunately, it took me a little bit more
20 time so--but I made the analysis and decided to walk.

21 Similarly, the so-called "net present value"
22 rule is widely used by businesses and it is taught in
23 business schools as a way to make business decisions,

1 and that of course is another form of benefit-cost
2 analysis.

3 In the '30s and '40s, economists developed a
4 theory of cost-benefit analysis as applied to public
5 policy. It should be pretty clear that a policy that
6 makes everybody better off is one that should be
7 pursued. But a lot of policies create both winners,
8 who are made better off by the policy, and losers,
9 who are made worse off, and so the question is what
10 to do then.

11 After due deliberation, economics arrived at
12 some kind of answer. Economists said that a policy
13 should be implemented if the aggregate benefits
14 outweighed the aggregate costs, that is, as long as
15 the gain to the winners exceeded the loss to the
16 losers. And in theory, the winners could compensate
17 the losers, making both sets of people better off,
18 and the policy would be preferable to both. And that
19 is what is called a potential Pareto improvement.

20 The requirement that the winners be able to
21 compensate the losers is called the Kaldor-Hicks
22 criterion, and it is really the basis for a lot of
23 the cost-benefit analysis that's gone on since that

1 time.

2 I will note that the Kaldor-Hicks criterion
3 and the usual benefit-cost analysis that economists
4 use typically ignore the distributional issues that
5 arise, but that can be an important consideration to
6 decisionmakers and policy.

7 Now in a business context, you know, you're
8 making a decision where it's pretty easy to figure
9 out what the benefits and costs are. You know, we're
10 talking about a profit maximizing company, and it is
11 interested in its own revenues and costs. But in a
12 public policy context, the benefits and costs are
13 often much more diffusely spread over a larger
14 population, and they are sometimes difficult to
15 quantify.

16 For example, an environmental regulation may
17 create recreational benefits to a wide variety of
18 individuals who partake of the improved natural
19 resource, and so it's hard to figure out exactly who
20 all those people are and what the benefit would be to
21 each one.

22 In addition, a public policy decision may
23 also need to take seriously those distributional

1 consequences that I talked about.

2 So there are complications, I think, in a
3 policy context, but nonetheless, a cost-benefit
4 analysis has been widely used in the United States in
5 the last 50 years. And, for example, as the OMB
6 Circular A-4 states, Executive Order 12,866 requires
7 agencies to conduct a regulatory analysis for
8 economically significant regulatory actions, and it
9 goes on to say that benefit-cost analysis is a
10 primary tool for regulatory analysis.

11 So it is natural, then, given all this, that
12 we would settle on the use of cost-benefit analysis
13 in our framework, but I want to emphasize that we are
14 really advocating a fairly broad definition of what
15 it means to do a cost-benefit analysis.

16 For example, we recognize that Congress, as
17 part of its decisionmaking, may want to consider the
18 distributional issues that would not traditionally be
19 considered in a pure economics cost-benefit analysis.
20 Or, Congress may want to weigh one group's benefits
21 or costs more than another's, and our framework is
22 flexible enough to allow that.

23 Now a common complaint about cost-benefit

1 analysis is that some costs and benefits are hard to
2 quantify and therefore they tend to get ignored. We
3 submit that that is really the fault of the analyst,
4 not the analytical tool itself.

5 One of the advantages of a cost-benefit
6 analysis, properly done, is that it requires the
7 analyst to lay out all of the costs and benefits,
8 even those that can't be quantified, and we think
9 that that is very important in this context, because
10 it promotes good decisionmaking in that all affects
11 of the proposed policy are at least considered, as
12 well as transparency, which is very important, we
13 think, in the context of a political process.

14 Now in our framework we gave a number of
15 examples of how one might go about measuring some of
16 the costs and benefits that would result. These are
17 not meant to be exhaustive. What they are really
18 trying to do is show, in a rough way, how you could
19 come up with estimates of costs and benefits in a
20 situation where you are probably not going to have a
21 huge amount of information available, which is pretty
22 much what we expect to be the situation Congress will
23 be in.

1 So to summarize, we used cost-benefit
2 analysis, because it's intuitive as a basis for
3 decisionmaking, has a strong economic foundation,
4 it's been well accepted by policymakers in other
5 areas, it forces the decision maker to identify and
6 consider all of the potential costs and benefits, and
7 it promotes transparency.

8 So thank you for your time, and I will now
9 hand things over to Darren.

10 MR. BUSH: Thank you very much,
11 Commissioners, for allowing me to talk with you today
12 about the report I have done with Greg Leonard and
13 Steve Ross.

14 I am in a slightly awkward position, because
15 my oral statement has mysteriously disappeared, but I
16 am a law professor and am therefore used to talking
17 off the cuff and will do so now.

18 I want to spend my time not summarizing the
19 report but accentuating some of the things that I
20 think are important implications of the report. And,
21 specifically, I want to focus on stage one and stage
22 two. Dr. Leonard has already talked about stage
23 three, and if I have time, I will be able to address

1 stage four and stage five.

2 But before I even do that, I want to point
3 out a couple of things about the report.

4 First of all, this report is not a panacea.
5 This report does not cure all the potential ills of
6 immunity analysis. Rather, it is a tool that will
7 hopefully be useful to Congress in determining the
8 relative merits or demerits of any particular
9 proposed immunity and any particular existing
10 immunity.

11 The report is in itself pragmatic,
12 recognizing that Congress has before it
13 considerations that go beyond things that we
14 traditionally think of in the antitrust realm.
15 Therefore, there are, for example, in stage two,
16 justifications that go beyond consumer welfare and
17 total welfare.

18 Secondly, the report is, embarrassingly
19 enough, not exactly much new--there's not much new in
20 there. These tools are very familiar in the
21 antitrust world, they are very familiar to the
22 administrative law world.

23 For example, in the Administrative Procedure

1 Act, there are inherent procedures for quasi-
2 legislation in the context of rulemaking, and for
3 administrative agencies to gather information, filter
4 that information, and to make relative cost and
5 benefit calculations based upon the information
6 before Congress.

7 Our report does something similar. It
8 borrows essentially what we think is to be Congress's
9 view of what good decisionmaking is, and it has
10 translated that into the Administrative Procedure
11 Act, and we have borrowed certainly from that.

12 In addition, of course, the administrative
13 agencies are subject to executive orders, which
14 require some cost-benefit calculations, and certainly
15 we are cognizant of that with regard to stage three.

16 With respect to stage one, I view stage one
17 as an important component actually of stage three.
18 Stage one is the input, if you will, to the stage-
19 three analysis. In order to do a full and complete
20 stage-three analysis, more information is better. So
21 we have in there provisions that allow for the
22 acquisition of information from a variety of sources.

23 One of the biggest sources, of course, is

1 the proponent of the immunity. Our report, in
2 addition to the ABA comments, puts the burden upon
3 those who propose the immunity.

4 We do so for very good reasons. To
5 paraphrase Deputy Assistant Attorney General Ken
6 Heyer, in the context of merger efficiencies, it's
7 the merging parties that have the unique ability to
8 obtain information with respect to their
9 procompetitive benefits of an acquisition.

10 Here, too, in the context of statutory
11 immunities, we have in--the proponents of the
12 immunity are in an inherently unique position to
13 provide that information as to the relative merits of
14 the immunity.

15 But that is not the only source of
16 information from which we encourage Congress to seek
17 information. Administrative agencies, antitrust
18 enforcement agencies, opponents of the immunity,
19 academics like myself, should all be able to provide
20 comments.

21 If you look at the report, you will notice
22 in one of the footnotes a discussion of interested
23 parties. Administrative law, in the context of

1 rulemaking, administrative agencies have to solicit
2 comments from interested persons. And that is far
3 too broad, we think, a standard for Congress, which
4 has much more limited time. So we used the term
5 "parties," despite its adversarial nature. There has
6 to be some cut-off, but we believe that the more
7 information, the better.

8 I am out of time even faster than I thought.
9 That's what happens when you don't have your written
10 comments, but I would certainly be happy to entertain
11 questions on stage two and four and five.

12 CHAIRPERSON GARZA: Thank you very much.
13 Commissioner Cannon.

14 COMMISSIONER CANNON: Thank you, Madam
15 Chair.

16 First and foremost, on behalf of all of us,
17 thank you very much for doing this work. It's not an
18 insubstantial thing that you have done; it is not an
19 insignificant amount of work.

20 We really appreciate this. It's a lot of
21 work, time, and effort. Obviously, it's a very
22 thoughtful piece, and we appreciate it.

23 I can say, reading it, probably some parts I

1 would agree with, some I might not, some I would
2 think would be useful, certainly for the Congress,
3 and then again thinking about how the Congress does
4 its business, perhaps not as relevant as if you were
5 in an administrative proceeding or in a court, for
6 that matter.

7 In that regard, there will be some folks who
8 will say, "Well, this is really too general and
9 nothing new, or it's really overly detailed." So you
10 will probably hear a lot of different comments here,
11 but overall I just want to leave you with saying
12 thank you for the help. We appreciate it.

13 Let me ask you, Greg, on your comments on
14 cost-benefit analysis, you do talk about the consumer
15 welfare test in the paper.

16 MR. LEONARD: Yes.

17 COMMISSIONER CANNON: Can you be more
18 specific? Are you talking essentially about, you
19 know, the benefit to end consumers, or do we care
20 about, you know, mid-stream consumers, or how would
21 you really define that consumer welfare test?

22 MR. LEONARD: Well, it would be end
23 consumers, in my view.

1 COMMISSIONER CANNON: So if there is some
2 impact along the way to before end consumers, that's-
3 -you wouldn't worry about that?

4 MR. LEONARD: Well, I should say the
5 framework itself actually contemplates addressing
6 impacts on groups all along the way, but if you are
7 talking about just the consumer welfare effect
8 itself, that would be the end consumer.

9 But if there was a--if the exemption would
10 have an effect on intermediate firms or other firms,
11 competitors of the firms covered by the immunity, the
12 framework does talk about evaluating those, either
13 benefits or costs to them.

14 COMMISSIONER CANNON: Do you have anything
15 to add, Darren? I know that Greg probably focused on
16 that mostly, but any comments on that?

17 MR. BUSH: No, I think actually he did it
18 very well.

19 COMMISSIONER CANNON: Okay. Great. Thanks.

20 And obviously you just heard John Sullivan
21 from the Commerce Department talk about the Export
22 Trading Company Act, and you know, which raises the
23 question there are certain statutes that fall in the

1 category that we are looking at today that one can
2 argue, it really just says that conduct that is
3 already going to be lawful is lawful.

4 So is that how you would--would you put the
5 Export Trading Company Act in that? What would you
6 do about that? How would you characterize that? And
7 obviously various people have opinions up here about
8 whether or not that statute should be continued. Do
9 you guys have an analysis on that?

10 MR. BUSH: Steering away from discussion, at
11 least for the moment, of any particular immunity, I
12 can talk generally about how I view basic industry
13 perception of the effects of antitrust laws on their
14 industry, and perhaps on conduct in that industry.

15 I think there have been, of course,
16 immunities passed for the purpose of assuaging those
17 kinds of concerns, and I suppose the question is,
18 what is the conduct at issue, and what is the real
19 risk of antitrust liability?

20 And, of course, as you go towards more *per*
21 *se* type of behavior, the risk is very high. As you
22 go perhaps to other types of conduct, the risk is
23 quite low. And if the risk is quite low, I think it

1 is incumbent upon the party seeking the immunity to
2 demonstrate why this is somehow viewed as a larger
3 risk than it actually is.

4 COMMISSIONER CANNON: Greg, do you want to
5 add to that?

6 MR. LEONARD: I was just going to say in the
7 framework, we are pretty clear that we say if no
8 justification applies, including situations in which
9 the conduct at issue would be lawful under antitrust
10 laws, in any event, the immunity should not be
11 granted.

12 So I mean that is our overall view, but I
13 think the problem, at least that was raised in
14 earlier testimony, is that there can be, for
15 instance, litigation costs just to get rid of
16 frivolous lawsuits.

17 Well, you know, that's a type of
18 inefficiency that might want to be considered. So I
19 think you would have to look at the facts of the
20 situation.

21 COMMISSIONER CANNON: And I think actually
22 you hear the argument, or you will, that Commissioner
23 Kempf raised or a question he posed to Mr. Sullivan,

1 which is, if it's not--if the conduct you are
2 addressing isn't unlawful, then you really don't need
3 it. But then does it really matter? Is it of any
4 consequence other than obviously putting one more
5 statute on the book to arguably protect conduct that
6 is already lawful?

7 So I don't know, you know, it's almost like
8 it doesn't matter or it does matter. You know, I
9 mean that's kind of the issue, the quandary that I
10 think you face for that.

11 MR. BUSH: Indeed, and that's why we have,
12 in essence, a sunset provision, because once the--if
13 Congress feels that there is a really strong
14 perception in the industry that the antitrust laws
15 might have some deterrent effect that they shouldn't
16 have on efficient conduct, then we can see whether
17 the immunity actually has somehow transformed the
18 industry, if more of these types of behaviors are now
19 engaged in because of the immunity, and we have that
20 data because we can review that in the review period,
21 and if there is no data that supports that anything
22 has changed in the industry because of the passage of
23 the immunity, then obviously the immunity had no

1 effect.

2 COMMISSIONER CANNON: Well, I was going to
3 ask--actually, the sunset provision was my next
4 question, which is, I have been involved in things
5 over the years and observed some things that happened
6 in Congress, and I think it may be safe to say that,
7 on occasion, a sunset provision gets added, because
8 it's kind of the price of final passage that will
9 allow this to go through for five years or 10 years.

10 Have you seen that in your research? I know
11 you obviously have a lot of reference here in the
12 report to legislative history and all of that. Do
13 you have a feel for that, as to how in fact a sunset
14 provision does get added to some--and, you know,
15 there are a lot of statutes other than antitrust-
16 related statutes, that have sunset provisions in
17 them. So, is that what you found? I mean, that's
18 kind of my impression, that, on occasion, you will
19 see exactly that; that is the final price of passage
20 of a statute.

21 MR. BUSH: Well, we're at a disadvantage in
22 antitrust land because of sort of the paucity of
23 sunset provisions. I haven't gone out and taken a

1 look at other realms of law to see the underlying
2 reasons for the sunset provisions and whether in fact
3 they were sort of a cost of the immunity.

4 COMMISSIONER CANNON: Greg, do you have any
5 comment on that?

6 MR. LEONARD: That's not really my area of
7 expertise; I'm sorry, I don't.

8 COMMISSIONER CANNON: Okay. And one other
9 question on legislative history. Obviously, you have
10 gone back and looked at quite a bit. If you had to
11 rate that today, in terms of putting it within your
12 framework, are there any particular examples that you
13 would cite that are particularly helpful here, or
14 would be closer to your model, versus others that
15 aren't?

16 MR. BUSH: I'm having trouble answering
17 this, because I keep thinking of sort of the effect
18 of the immunity--but I think it's very helpful to
19 see, if you look at the most recent Standards
20 Development Organization Advancement Act, if you look
21 at the purpose underlying the legislation, you can go
22 back to legislative history, and I can actually see
23 what the underlying concerns were.

1 I think that is a fairly detailed
2 legislative history in that regard, without making
3 any comment as to whether the statute actually has
4 the effect that legislative history intended.

5 COMMISSIONER CANNON: Good. I'm cognizant
6 of the time here. We don't have very much, so let me
7 yield the balance of my time to Jon or--

8 COMMISSIONER YAROWSKY: Hi. I wanted to add
9 my voice in giving thanks to you all and Steve Ross
10 for your *pro bono* excellent activity on behalf of the
11 Commission's inquiry.

12 You know, there are three categories of
13 immunities and exemptions that seem to spring up.
14 Mainly, they are statutory. I think that's where
15 your main focus was.

16 There were a few case exemptions that were
17 primarily legal fictions, and they still exist, and
18 then there is a whole area of implied immunity. Now
19 that's kind of--that emanates out of probably the
20 study you looked at, but that area may be one of the
21 most provocative as we go forward.

22 We are also going to have some hearings
23 coming up on regulated industries, and I think we

1 will look into that at that time, but we may want to
2 touch on it just briefly here.

3 Here is a question for you, though. Let's
4 try to really set up the environment we're thinking
5 about. As I said, I think it's really Congress,
6 because the great bulk of these immunities and
7 exemptions are statutorily created.

8 That means Congress is going to have to
9 evaluate a framework. It may be yours, it may be our
10 suggestions, but hopefully this activity in this area
11 will generate some type of framework.

12 There is very limited time. The same
13 committee that maybe in the morning has a hearing on
14 an exemption will then in the afternoon have a 2 p.m.
15 hearing on the PATRIOT Act and then at 5:30 vote on
16 the budget reconciliation. That doesn't mean this
17 isn't great work; it is. I mean, it's incredible
18 what goes on in Congress. But there is a limited
19 amount of time to focus. For that reason I think the
20 greatest utility I see of the framework that you have
21 produced is more in the procedural area. In no way
22 am I diminishing your contribution, because I really
23 believe that it's in a procedural framework that

1 Congress may have its greatest direction from you,
2 from us, from anybody, so that there is a more
3 regularized process.

4 You know, in the '80s, the same concern
5 grew, not out of exemptions, but out of the rules of
6 evidence and the rules of civil procedure. Now,
7 Congress has plenary authority to create those rules
8 any way it wishes, somewhat because of the
9 unsystematic way that things were proceeding in the
10 '70s and the early '80s, the concept of the Rules
11 Enabling Act came up, and there was actually a
12 process where the Judicial Conference developed some
13 suggestions, forwarded them to Congress, and then
14 Congress had a procedure in which it could respond,
15 modify, accept, and whatnot. They still retained
16 plenary authority to do whatever they wanted.

17 I think we are in the same area. That's
18 just my instinct about this, and I think that's why I
19 am particularly interested in exploring, when we have
20 a little more time, because we are limited on this
21 particular panel, your procedural suggestions.

22 As to some of the substantive analysis, I'm
23 not saying that is less important. I mean, we could

1 get into a grand debate about your definition of
2 consumer benefit or consumer welfare versus total
3 welfare. We could do that. I don't think Congress
4 is going to do that. I think they will do a
5 balancing test; they will call it--and I say this in
6 an admiring way--they will call it "cost-benefit
7 analysis."

8 The rules of evidence in Congress are not
9 the rules of evidence in court. It's like an
10 arbitration. Everything that's relevant comes in.
11 Okay? And everything relevant will come in, whether
12 it's economic, or social. And there will be a
13 balancing test eventually.

14 So that's why I believe a lot of the
15 procedural and presumptive ideas that you have come
16 up with really are very fertile for us to explore,
17 and we will do that.

18 Second, on the implied immunity area--and we
19 may talk about this next week, but we may want to
20 talk about it a little bit today. The state of
21 regulation has changed, too, and whereas before there
22 was, in a sense, a dialectical model; there were
23 either free markets, you know, safeguarded by

1 competition, or there was a comprehensive, pervasive
2 regulatory scheme.

3 In such a situation, the antitrust laws
4 would yield because of the clear preference of
5 Congress to have regulation.

6 In the deregulated environment that we have
7 been in, which I think is a very positive
8 development, in the last 15, 20 years, we have at
9 times reached a hybrid state where you really don't
10 have complete comprehensive regulation, and for that
11 reason the role of antitrust in regulation is
12 somewhat in flux.

13 How do you respond to that, Mr. Bush,
14 Professor Bush, in terms of how we may need to look
15 at the interactive effect of both in a way that maybe
16 we haven't before?

17 MR. BUSH: Well, let me first respond to the
18 notion that the report is probably most useful in its
19 procedural aspects. And I agree. And one of the
20 reasons I agree is that Congress, like generalist
21 judges, really has no expertise in this area that we
22 all have expertise in here.

23 So I think that providing them with a

1 framework that they can turn to when an issue of
2 statutory immunity comes up is quite useful.

3 With respect to the second issue of the--I
4 would call it the--either the tension or
5 complementary nature of antitrust in regulation, and
6 you see both in the literature. You see law
7 professors and judges talk about antitrust and
8 regulation as substitutes, and other times as
9 complements.

10 I view it in the context of the most recent
11 sort of trend toward deregulation, and I use that
12 deregulation term very loosely, that the whole point
13 of these deregulation movements is to create some
14 competition, and that competition is established by
15 the rules of the game that are created by some
16 administrative agency.

17 So the purpose of the regulation is not the
18 displacement of the competition but the creation of
19 competition, and if it is the creation of competition
20 that is being sought, then antitrust law plays a very
21 complementary role.

22 COMMISSIONER YAROWSKY: So you say that
23 antitrust law should not be displaced in a situation

1 where there is not pervasive comprehensive
2 regulation, and in fact the regulation is actually to
3 stimulate competitive markets? Is that what you are
4 saying? So the antitrust laws should apply?

5 MR. BUSH: Indeed. If you look at--and, as
6 an example--I'm currently writing an article on
7 everything that everybody loves to talk about,
8 primary jurisdiction, implied immunities, express
9 immunities, state action, and *Keogh*, which I will
10 call the "everything" article.

11 But in the context of state action, if you
12 look back at--harken back to the original notions of
13 state action, which is, of course, based upon
14 federalism, it's this notion that states have the
15 ability to regulate, in the old traditional sense of
16 regulation, sort of monopoly-rate regulation,
17 activities within their state.

18 But now there are oftentimes movements not
19 to displace competition with regulation, but actually
20 to use regulation to instill competition, and in
21 those instances I think that antitrust law should
22 apply as well.

23 CHAIRPERSON GARZA: Well, I want to thank

1 you very much for appearing here today, again, for
2 the work that you did on the report, and also for
3 your testimony here today. I'm sure there is more
4 that we could ask you, and there probably is more
5 that we will follow up on, but I will let you go for
6 now and ask that the next panel--we'll take about a
7 five-minute break and then proceed with the final
8 panel.

9 Thank you very much.

10 (Recess.)

11 CHAIRPERSON GARZA: I would like to begin
12 this afternoon's third panel on the subject of
13 immunities and exemptions, and welcome to the
14 panelists here today.

15 The procedure that we have been following is
16 that each of you will have five minutes to summarize
17 your testimony. After that, we will have questioning
18 by the Commissioners. We will begin with Mr.
19 Yarowsky, who will have 20 minutes and will be the
20 lead questioner for the Commission for this panel,
21 and then following that, each of the Commissioners
22 will get about five minutes to ask their own
23 questions.

1 Alden Abbott, since you are the current
2 government official, we will begin with you, if you
3 would like to summarize your statement for us.

4 MR. ABBOTT: Thank you, Madam Chair, Mr.
5 Vice Chair, Commissioners. Thank you for inviting me
6 to speak today. My statement and my responses to
7 questions reflect the views of the staff and not
8 necessarily the views of the FTC or any individual
9 Commissioner, but the Commission has voted to
10 authorize my statement.

11 As a baseline proposition, we strongly
12 believe that an economy based on vigorous
13 competition, protected by the antitrust laws, does
14 the best job of promoting consumer welfare, economic
15 efficiency, and economic growth.

16 This conclusion is supported by economic
17 studies, both domestic and international, and most of
18 our economy is based on the competitive model.

19 Accordingly, laws or regulations authorizing
20 departures from the competitive model should be
21 disfavored, and proponents of such departure should
22 bear a heavy burden of demonstrating, with factually
23 supported reasons, why such a regime is necessary.

1 Congress, over the years, has adopted a wide
2 range of measures that partially or fully immunize
3 certain sectors of the American economy from
4 antitrust review. Collectively, these sectors of the
5 economy cover a substantial volume of commerce.

6 It is not my purpose today to argue about
7 the original merits of Congress's decision to
8 displace the antitrust law, in particular cases. I
9 believe, however, it is important to consider whether
10 the continued existence of these exemptions in their
11 current form fosters the goal of a strong, innovative
12 growing American economy, or instead undermines it.

13 Many exemptions allow firms to agree to
14 limit the terms of competition among themselves and
15 impose restrictions on entry into the affected
16 sector. From an antitrust perspective, such
17 agreements, particularly agreements among horizontal
18 competitors, generally present the greatest risk of
19 competitive harm. Unless the restraint is reasonably
20 necessary to the generation of countervailing
21 efficiencies, consumers are likely to suffer.

22 Basic economic theory teaches that a non-
23 regulated competitive market generally leads--

1 competitive market generally leads to the
2 economically efficient level of output, and I won't
3 get into the minor qualifications.

4 However, it is certainly a general rule, and
5 also, as a general rule, regulatory intervention,
6 absent a very strong case, is not necessarily likely
7 to improve performance.

8 In contrast, a restraint that affects--
9 effectively raises price above a competitive level
10 generally will result in consumers buying less of the
11 product or service, and firms producing less at a
12 higher price, than under competitive conditions.

13 Accordingly, a restraint lowers economic
14 welfare and consumer welfare, and it is well accepted
15 that competition itself, moreover, is an engine that
16 drives economic efficiency, sometimes called dynamic
17 efficiency.

18 Accordingly, economic logic suggests
19 antitrust exemptions may well handicap economic
20 progress of industries they are intended to protect.

21 This is more than theory. Much empirical
22 literature supports the proposition that industries
23 sheltered from competition perform more poorly than

1 those subject to competition.

2 Now many of the existing exemptions are
3 decades old, and represent a time when the American
4 economy was very different. Thus, even if one
5 assumes, for the sake of argument, there may have
6 been valid economic justifications for specific
7 industry exemptions in the past, it is not at all
8 clear that those justifications still hold water.

9 Moreover, we do not believe that an
10 antitrust exemption is necessary to achieve any
11 efficiency gains that an exemption allegedly might
12 bring forth. Modern mainstream antitrust analysis
13 does not condemn efficient collaborations, only such
14 agreements as collaborations that diminish
15 competition and harm consumers.

16 In short, antitrust today should not be
17 viewed as an impediment to economically desirable
18 forms of collaboration.

19 Finally, foreign jurisdictions are
20 broadening the scope of their antitrust laws and
21 subjecting to antitrust scrutiny formerly exempt
22 sectors. It would be ironic if the U.S., which
23 argues for strong application of antitrust laws

1 overseas, would now take the lesson and apply its own
2 medicine.

3 And then in summary, we believe, although we
4 have not studied individual exempted industries, as a
5 general matter derogations from competition harm the
6 American economy and the consumer, and the AMC and
7 Congress may well wish to address the question of
8 whether individual statutory antitrust exemptions
9 continue to make sense.

10 Specifically, Congress and the AMC may wish
11 to examine critically the current validity of
12 whatever justifications may be offered in support of
13 each exemption and to assess the overall impact of
14 each exemption on consumers and on the economy.

15 Thank you.

16 CHAIRPERSON GARZA: Thank you very much.
17 Professor Ross, a five-minute summary of your--

18 MR. ROSS: I thought I was going to go last,
19 but--

20 CHAIRPERSON GARZA: Oh, well, you can go
21 last. Professor Carstensen.

22 MR. CARSTENSEN: Any professor will do; is
23 that it, at this hour of the day?

1 (Laughter.)

2 MR. CARSTENSEN: Okay. Thank you. I am
3 really honored to be asked to share my views with
4 you. I do want to emphasize that these are my views,
5 since I am involved in a couple of collaborative
6 projects, and I speak only for myself when I
7 reference any of the work that we have done
8 collectively.

9 My first of five brief observations is that
10 I think the framework that has been proposed by Steve
11 Ross and his colleagues has a great deal of merit to
12 it, especially emphasizing the need to put the burden
13 on the proponent of an exemption to come forward with
14 clear justification.

15 And I do think it is useful to emphasize to
16 Congress the need to consider both costs and
17 benefits, although, as the ABA comments note, and I
18 tend to concur, it is a little problematic as to how
19 well Congress can go about doing that process.

20 I do have a couple of reservations about the
21 details of the framework that they propose. The
22 first is that I think more emphasis should have been
23 given to the problem of buyer power and harms that

1 producers can sometimes suffer from in the face of
2 buyer power, and, in that context, where
3 modifications of antitrust law might avoid some of
4 those or even eliminate some of those problems.

5 Secondly, I am a little concerned that the
6 many examples do not narrowly define the kinds of
7 conduct that should plausibly require exemptions.
8 These are naked restraints of competition, mergers,
9 or joint ventures where the objective is to create
10 market power. And we had a good discussion earlier
11 about the trade regulation example, which is one of
12 those that ought not to be even in this subset, it
13 seems to me.

14 My third point is that there are some
15 additional issues of general application to
16 exemptions. The first, which the framework and the
17 ABA both endorse, is sunset provisions. I think that
18 would be extremely helpful in getting further review
19 and reflection on the merits of these things.

20 A second point that is in various comments
21 and implied in the framework is the need for some
22 metric of strict construction of these statutes.
23 There's a wonderful quote that I have from Judge

1 Easterbrook.

2 I commend your attention to both the
3 Wisconsin and the Connecticut state statutes, that
4 implement a strict construction approach. I think
5 that is something you could urge on Congress as a way
6 of constraining the scope of exemptions.

7 Finally, I think it would be terrific if you
8 could get Congress to put exemptions in one place in
9 the U.S. Code. Todd Anderson and I spent a lot of
10 time going back and forth trying to ferret all those
11 puppies out, and we are still not sure we found them
12 all. And I think it would be helpful to illuminate
13 the nature of what's going on.

14 A fourth general point, echoing Mr. Abbott,
15 is just how important competition is, that regulation
16 and exemption from antitrust in general is not
17 efficiency enhancing, and does not serve social
18 goals. We ought to move towards a more open
19 competitive economy. That is our first best policy
20 point.

21 My general observation in our case studies
22 of specific exemptions find generally that they are
23 just not very useful.

1 Turning to the specific categories that you
2 raised, the Fishing and the Webb-Pomerene statutes
3 should go. Nobody is using them; they should be
4 knocked on the head because they are useless.

5 The discussion today of the trade bill shows
6 that trade law is really an example of variation of
7 the business review clearance process, and it is
8 probably worth your while thinking about whether
9 adapting something from that or some of the other so-
10 called modification statutes might provide a better
11 business review clearance process for general use.
12 There is no reason to do it for just one set of
13 businesses if there are significant transaction costs
14 that can be cheaply avoided by seeking clearance, and
15 I'm not sure that there are.

16 In agriculture, it is very important to
17 distinguish between Capper-Volstead and the
18 Agricultural Marketing Agreement Act. It is not
19 Capper-Volstead that is the problem or the source of
20 market power; it's the AMAA, which is a system of
21 government-authorized cartels, which are especially
22 pernicious in the area of dairy.

23 In the Shipping Act, we have another example

1 of a holdover from the past that ought to be put out
2 to pasture or sunk at sea, or whichever is the
3 appropriate metaphor.

4 More importantly, I put together an exhibit
5 at the end of my statement. We have got a set of
6 transportation exemptions that are all holdovers from
7 much more generalized regulatory systems. It is
8 really thinking--urging Congress really to think
9 about whether there can't be a more systemic
10 transportation oversight system, maybe with primary
11 jurisdiction or something that would solve that
12 problem.

13 Lastly, the insurance area is one where the
14 ABA in 1989 said that the McCarran Act is
15 overinclusive and unnecessary. Modern experience
16 shows that most states actually encourage competition
17 in insurance.

18 There is, as the ABA said, need for a
19 carefully crafted safe harbor for forward-looking
20 information exchanges in that industry, and I think
21 that probably is still a valid small piece that is
22 there.

23 Reform of the exemption process and its

1 results, I think, is long overdue. I think you at
2 the AMC can make a major contribution to the public
3 interest if you can induce Congress to act.

4 Thank you.

5 CHAIRPERSON GARZA: Thank you. Mr. Miller.

6 MR. MILLER: Madam Chair, members of the
7 Commission, I appreciate the invitation to appear
8 today. I think it's an honor to contribute whatever
9 small amount I might to the work of this Commission.

10 I think the starting point for any
11 discussion about antitrust immunities ought to be the
12 antitrust laws themselves. Or, do the antitrust laws
13 contribute to economic efficiency, or do they not?
14 There is a respectable body of academic literature
15 out there that suggests they do not, and that is
16 something I think the Commission should look at.

17 I don't hold that view; I don't share that
18 view, but it's something I think you ought to
19 address. If I am correct, and the antitrust laws do
20 contribute to economic efficiency and to public
21 welfare, then it would seem to me that any exemption
22 from the antitrust laws should be reversed; any
23 immunities and exemptions don't make sense.

1 Now I know there are a lot of complicated
2 things out there, but if you look at the antitrust
3 immunities and exemptions, they tend to be the
4 product of a lot of self-interest, very concentrated
5 interest as opposed to very great diffuse interest,
6 that is American consumers'.

7 I want to thank the Commission for
8 authorizing or commissioning or enabling this report
9 by Messrs. Bush, Leonard, and Ross. I think it is a
10 first-rate piece and establishes basically a decision
11 tree that Congress and the President ought to use in
12 deciding whether antitrust immunities or exemptions
13 make sense.

14 I also want to pay tribute to the comments
15 by the American Bar Association. I thought they were
16 spot on, especially in their description of the
17 reasons that you have--you get some of these
18 antitrust immunities and exemptions.

19 So the bottom line is I think that for the
20 most part, antitrust immunities and exemptions,
21 especially those that simply enable anticompetitive
22 behavior, ought to be reversed. Two of them, of
23 course, are farmers and labor, and I am no Don

1 Quixote here; I don't think it is likely that
2 Congress is going to reverse the antitrust immunities
3 and exemptions for organized labor, or for farmers,
4 either. It would be easier to reverse it for farmers
5 than for organized labor, but hope springs eternal.

6 Commissioner Cannon, I am sure, can give
7 some observations on how you can get things like that
8 through Congress. But I am not very hopeful.

9 I will say that I think a conclusion you
10 might draw about the present system of antitrust
11 immunities and exemptions is that--two conclusions.
12 One is that the original rationale probably doesn't
13 exist anymore. That is, that what led to them, at
14 least on paper, aren't the conditions that they
15 describe--and that includes organized labor--don't
16 really exist to the degree that they did then.

17 And secondly, and accordingly, the adverse
18 effects on the economy and efficiency are not as
19 great as they were then.

20 Now let me say that I would suggest the
21 Commission consider not only immunities and
22 exemptions from the antitrust laws, but immunities
23 and exemptions from the antitrust principles, and No.

1 1 on my list of activities that violate not the
2 antitrust laws but antitrust principles is the way
3 the market for political representation is
4 monopolized in America.

5 And I specifically think of members of
6 Congress and the market for selecting members of
7 Congress. You have a lot of people out there who
8 would like to be members of Congress, and you have a
9 lot of people, and then you have voters wishing to
10 make choices among them.

11 But guess what. There are sort of two
12 classes of folks. One is incumbents and the other is
13 everybody else, and the incumbents set the rules
14 under which competition will take place. Not
15 surprisingly, they establish rules that are quite
16 adverse to challengers and very much in favor of
17 incumbents. They put limits on the advertising,
18 called campaign--indirectly control campaign
19 expenditures. They amass war chests. They do so
20 many things, as I said in my written statement, which
21 I hope you will include in the record, and the longer
22 piece that I attached to the paper. They engage in a
23 lot of activities that really limit competition, and

1 I think result in the same kinds of monopolistic
2 behavior and the adverse effects on efficiency and
3 public decisionmaking as you get in the market for
4 goods and services.

5 When I was chairman of the Federal Trade
6 Commission, especially in the early years of the
7 Reagan administration, I was roundly condemned from
8 time to time by some members of Congress for not
9 being sufficiently aggressive in enforcing the
10 antitrust laws, and they would characterize my
11 behavior as letting these monopolistic practices go
12 with even challenge, and I used to sit back and
13 think, "But the way you organize your own market is
14 just absolutely contrary to all the principles you
15 are espousing."

16 So, in any event, I think that is something
17 that you might at least touch on, and I apologize for
18 getting on my hobby horse on that issue.

19 Thank you.

20 CHAIRPERSON GARZA: Thank you, Mr. Don
21 Quixote.

22 Professor Ross, are you ready?

23 MR. ROSS: Thank you very much, and it is a

1 great opportunity to participate. It has been a very
2 enjoyable experience, and it is great to be able to
3 respond to comments, *et cetera*.

4 To start, I looked at the list of 29
5 exemptions that we prepared in appendix A, and I
6 thought about all the incredibly important issues
7 that Professor Carstensen talked about, and about the
8 issues of capture and how things work in the beltway,
9 which I am sad to say it's going to be 20 years since
10 I've been out of.

11 The fact is that you guys, such a talented
12 group of very busy Commissioners, spent 45 minutes
13 the export exemption, and why is that? Because a
14 major cabinet government official wanted to come and
15 talk about the export trade exemption, and so
16 therefore, we spent two minutes talking about all the
17 transportation exemptions, and 45 minutes talking
18 about the export exemption. This sends a cautionary
19 note about this whole process, and regulated
20 industries as well.

21 And then when you think about the whole
22 dialogue and the excellent questions--and I am sure
23 that Mr. Burchfield's fees are reasonable--

1 (Laughter.)

2 MR. ROSS: --and notwithstanding that, I am
3 sure that they are--his hourly rate is substantially
4 more than Commerce and Justice Department lawyers.
5 But it isn't that much more in the sense that the
6 time it would take Mr. Burchfield to write an opinion
7 letter, which would be, however, a very thorough job,
8 I'm sure, compared to the time it would take to do a
9 very thorough and rigorous analysis of the same
10 issues by a GS-15 lawyer--now if that is all we
11 talking about in terms of the time--I mean, that's an
12 issue you can think about, but I have to say that I
13 am skeptical that that is going on when we talk about
14 these reviews.

15 It seems to me that is why one of the things
16 that is an important part of our framework is that a
17 presumption--and Congress is free to reject it--but
18 the presumption should be that, in any matter
19 regarding an ascertainment of competitive effect
20 other than by Congress, it ought to be by the Justice
21 Department or the Federal Trade Commission. And it
22 ought not to be--I'm sure there are very smart
23 lawyers in the Commerce Department, Transportation

1 Department, and elsewhere. But I think the level of
2 both the quality and consistency and lack of capture
3 and lack of bureaucratic concern make it a very
4 important--it would be a major contribution if the
5 Commission would see fit to endorse that aspect as a
6 presumption that again Congress is free to get rid
7 of.

8 My second comment is that I am glad that our
9 framework is taken sufficiently seriously that
10 everybody wants to sort of get on one side as opposed
11 to the other of the labeling process when all these
12 decisions are decisions for Congress to make. So
13 some people took issue with the fact that an
14 efficient practice that wouldn't redound to the
15 benefit of consumers is a ground for exemptions and
16 they would rather have it called lawful while
17 Professor Carstensen thinks that buyer power is an
18 important issue. I agree that buyer power is an
19 important issue, but I would say we took care of it;
20 we just call it wealth distribution, and maybe he
21 would rather not call it that; he would rather call
22 it something else.

23 So I am glad that our framework is being

1 taken seriously, but I want to emphasize that,
2 whatever you call these things, Congress can do all
3 of this, and they will do all of it, and it's all in
4 the balancing.

5 Unlike judges, where burdens of proof
6 matter, I am skeptical that to an average
7 Congressman--the fact that the framework called
8 something a social policy consideration as opposed to
9 an economic efficiency consideration really matters.
10 If it's a plus that they care about, they are going
11 to take it seriously. If it's not a plus they care
12 about, they won't take it seriously.

13 And then finally, let me just suggest a
14 great political opportunity here, because, as I was
15 thinking about this and approaching it--I am one in
16 the maybe, probably, unique position of as a young
17 lawyer, having spent two years of my pre-academic
18 life with Bill Baxter as a boss and the two next
19 years of my pre-academic life with Howard Metzenbaum
20 as my boss, and I think that when I heard Chairman
21 Miller's comments, I think that there is a unique
22 opportunity here. There is widespread and steadfast
23 view--a view of public political economy that

1 Chairman Miller represents that is basically that
2 these exemptions are terrible.

3 I think there is now much more skepticism on
4 the part of people who, in the past, might have
5 favored regulation. There is much more of a sense
6 that the interests that get represented are corporate
7 interests or others who are interested in harming the
8 public, and I think there is a real coalition here,
9 that the AMC can lead, of people on all sides of the
10 aisle to really make a significant contribution here.

11 So I will stop there, and welcome questions.

12 CHAIRPERSON GARZA: Well, thank you. That
13 was well worth waiting for. I'll give it to
14 Commissioner Yarowsky to begin.

15 COMMISSIONER YAROWSKY: Thank you all. We
16 feel that this is an incredibly important area if we
17 can concretize it a bit in terms of our deliberations
18 and our recommendations ultimately.

19 For that reason, it sounded like there may
20 be an emerging consensus--I don't want to put words
21 in your mouth, but I would like to check that out--
22 about certain aspects of the framework or just your
23 general point of view.

1 Can I just take off four or five points and
2 just sense whether there is a building consensus
3 there?

4 That the proponent of an immunity or
5 exemption should have the burden of persuasion,
6 either to renew that exemption or to get a new one.

7 CHAIRPERSON GARZA: For the record, probably
8 instead of just having people nod, they should
9 articulate.

10 COMMISSIONER YAROWSKY: I wanted to go
11 through this. Let me just list them, though.

12 Second, there should be an extensive public
13 and transparent record, and, if in fact legislation
14 is produced, an extensive and precise legislative
15 history. So public record and legislative history.

16 Three, immunities or exemptions should be
17 time limited, with some type of sunset provision.

18 Four, there should be some type of cost-
19 benefit analysis, and maybe a suggested analysis, and
20 that's one of the questions I want to follow up with
21 you about.

22 Five, these immunities and exemptions should
23 be codified in one place so there is a real

1 recognition of what exists, or at least incorporated
2 by reference because, as you have seen, Professor
3 Carstensen and others, they are scattered throughout,
4 and some are not just stand-alone exemptions. So
5 they are tied into other provisions.

6 And six, before you go the full distance to
7 pass an immunity, you should look at less restrictive
8 alternatives.

9 Now, one--well, could you all comment about
10 those? And if I left a hallmark that we should be
11 considering, let me know.

12 MR. ROSS: If I could jump in, I would
13 divide the second point you made, Commissioner
14 Yarowsky. I agree; I agree with all of them, but I
15 think that there are two separate things, and the
16 reason I say it is, one is maybe easier to insist
17 that Congress give than another.

18 I would like there to be a transparent
19 record; I would like there to be a full cost-benefit,
20 with a full hearing, lots of testimony, everything we
21 set out.

22 Sometimes that doesn't happen; there is a
23 rush of business, the subcommittee chairman is having

1 a fight with somebody, and so things don't always
2 happen the way we would like.

3 But with regard to the legislative history,
4 I think, at a minimum--even if there's some good
5 reason that members of Congress perceive that they
6 can't do that, there is just no excuse for the
7 sponsor of the legislation not getting up and, in a
8 floor statement, making this case. And I think any
9 member of Congress has the right to insist on, and
10 more realistically, it is a lot easier to say to a
11 senator or a congressman, "Okay, you know, I
12 understand why you couldn't get a hearing at the
13 committee or whatever, but at least, you know, this
14 framework says you need to make this case." At least
15 you get up and articulate this case in the
16 *Congressional Record* and let us say it.

17 So I would just recommend that you split
18 those two, so even if one can't be achieved, the
19 other might be.

20 COMMISSIONER YAROWSKY: Okay. Chairman
21 Miller.

22 MR. MILLER: The answers to your six
23 questions are:

1 Yes, yes, yes, yes, yes, and yes.

2 I would like to amplify on No. 5. I would
3 also suggest that the committee of jurisdiction in
4 both houses be the Judiciary Committee and not the
5 special interest committees.

6 COMMISSIONER YAROWSKY: Thank you. Mr.
7 Abbott.

8 MR. ABBOTT: Speaking for myself, I think
9 your six points are generally consistent with the
10 central point I was making in my testimony that the
11 burden should exist both at the time an exemption
12 first is considered and at regular intervals
13 thereafter. The burden should be on the proponent of
14 the immunity, and it is well worthwhile for Congress
15 to look closely at the costs, the benefits, and the
16 effects of particular immunities, and it strikes me
17 that the six points certainly are consistent with
18 that overall message.

19 COMMISSIONER YAROWSKY: Professor.

20 MR. CARSTENSEN: I concur, and I think
21 Chairman Miller's suggestion of these being directed
22 to the Judiciary Committee as the one with oversight
23 of competition issues is a particularly good

1 addition.

2 COMMISSIONER YAROWSKY: Thank you. Let's
3 look at just one of them briefly, and I don't mean to
4 take too much time, but as I said in the earlier
5 panel, I am a bit concerned, having watched this
6 process a lot, that if we make a highly detailed
7 recommendation embodying a very sophisticated
8 economic analysis, however you want to define cost-
9 benefit, that that may not be the appropriate
10 guidepost for the kind of analysis that needs to be
11 done up there.

12 If one could, in just a few sentences--and
13 if you can't do it here, maybe you could help us
14 after this hearing--make a suggestion, backed up by
15 longer analysis, but what kind of description would
16 you give the Judiciary Committees in terms of the
17 balancing tests they are going to have to do?

18 MR. MILLER: I would make the suggestion
19 that you follow, by and large, the decision tree that
20 Professor Ross and his colleagues outlined, but the
21 Committee could draw on its own staff, people like
22 Mr. Cannon there when he was up on the Senate
23 Judiciary Committee, and also CBO has a reservoir of

1 considerable expertise for Congress to answer just
2 that sort of question.

3 COMMISSIONER YAROWSKY: Steve.

4 MR. ROSS: I hate to be sort of defensive,
5 but we submitted, in addition to the report, an
6 overview, and if you look at the overview, stage
7 three is less than one page; it has six subsets, and
8 I really think that that stage three, that one-page
9 thing, is a workable standard. And the lobbyists can
10 haggle with the staff and the various interest groups
11 when they're fighting over it about whether they have
12 accurately done it and then whether this fits within
13 Greg Leonard's example 1 or not, and people can argue
14 about that, but I think that the six steps that are
15 taken, that are reflected with bullet points in less
16 than a full page, really is something that is a
17 workable standard that we can--the Chairmen of the
18 Judiciary Committees, if they buy into it, can just
19 say, "We expect, when you guys walk in to us, that
20 you will cover these points."

21 COMMISSIONER YAROWSKY: Professor.

22 MR. CARSTENSEN: This is the problem you're
23 going to have; it's really got to be the Chairmen or

1 other leaders of the Committees who are saying to
2 proponents and to staff, "Here's the kind of
3 information you've got to come in with, and here's
4 the kind of commentary we need before we can go
5 forward." That gives a certain level of deniability
6 to the Committee--"Gee, we'd love to help you, but
7 you haven't crossed your "T"s and dotted your "I"s on
8 this.

9 One thing that occurred to me, and I can go
10 back to your six points, is that there may be a
11 seventh, which is a strict construction of any
12 exemption or immunity that is granted.

13 Again, I refer to you the Wisconsin
14 statutory language as a way of giving courts a
15 clearer notion of what they are supposed to do when
16 they confront one of these exemptions.

17 COMMISSIONER YAROWSKY: That has been very
18 helpful.

19 MR. ROSS: Let me just throw in something
20 that should not probably be in your formal report,
21 but might be something some of you might mention when
22 you are marching this up to the Hill. Given the
23 problems that Chairman Miller identified with the

1 political marketplace, I would observe that a sunset
2 provision allows people to restudy an issue every
3 five years, and if important campaign contributions
4 have to be made so that the Committee focuses
5 properly on their issue every five years, certainly
6 some members of Congress might find that to be a
7 realistic benefit of what we otherwise consider to be
8 a public interest proposal.

9 COMMISSIONER YAROWSKY: Well, we're happy to
10 have you back after 20 years.

11 Professor, you also suggested in your
12 testimony that one should maybe create--you didn't
13 say presumptions, but consider such things as pooling
14 and other types of joint ventures as reasons. Can
15 you explain that a little bit further?

16 MR. CARSTENSEN: Well, there are two
17 different categories here. That is, a joint venture
18 as described earlier in the trade context, which is a
19 legitimate productive venture, seems to me to be
20 exactly the kind of thing that is now clearly made
21 lawful by federal antitrust law. And to the extent
22 you have questions about it, you come through the
23 business review clearance.

1 What I have been looking at in the context
2 of agricultural markets--and here I think I am
3 somewhat at odds with Chairman Miller--is that the
4 problems that arise when you have got a single buyer
5 or a few buyers in a market who can exercise very
6 substantial buyer power, if they deal one on one with
7 a whole group of small producers--in that context,
8 there is an efficiency gain in terms of market
9 facilitation possible, when you allow the producers
10 to organize into some sort of a bargaining or
11 marketing group, so that you get a negotiation that
12 will revolve around costs and a more equal allocation
13 of the benefits.

14 And again, the examples that I used--and
15 this may be significant--where the buyer in turn is
16 in a downstream competitive market so that it does
17 not have any monopoly power in the resale of the
18 goods, so that we are not looking at a division of
19 monopoly but rather looking at the--I think they are
20 called Ricardian rents--that arise within the
21 efficient production and who is going to be receiving
22 those.

23 That kind of problem, which may be

1 resolvable in part by the use of some kinds of group
2 negotiations, I would emphasize that, as I said in my
3 paper, the first best choice is to figure out some
4 way to facilitate the efficient operation of the
5 market as a market, and that is where my preference
6 would be and where I have actually been advocating in
7 some other agricultural areas for reform of the
8 marketing system so that you can have much more
9 individual transactional markets that work with the
10 problem of excessive exploitation.

11 COMMISSIONER YAROWSKY: All right. Thank
12 you very much.

13 Mr. Abbott, given the framework we have
14 sketched out, and that you have heard, would you have
15 any problem with Congress reviewing the exemption
16 that applies to non-profits in terms of the FTC's
17 investigative ability?

18 MR. ABBOTT: Well, I think the framework I
19 proposed, we proposed, was a general one that in
20 principle should apply to all immunities.

21 COMMISSIONER YAROWSKY: Okay. I accept
22 that.

23 Chairman Miller, you have really made a

1 difference in this town in terms of moving it and
2 others, too, to consider deregulation and
3 privatization in a very important way, an historic
4 way in the last 20 years.

5 MR. MILLER: The jury is still out on
6 whether that is a positive or a negative.

7 COMMISSIONER YAROWSKY: Let's just take a
8 freeze frame. I'm going to give you credit today.
9 But I do want to ask you and others, because I think
10 this isn't a subject of immunities and exemptions,
11 and you may have heard me lead up to it in the
12 previous panel. There is kind of a--in some
13 instances there is a hybrid state of regulations so
14 that Congress passes a regulatory act or delegates
15 regulatory authority. It's not like the old days,
16 like in the ICC days, where there is a total
17 regulatory scheme, which would clearly displace
18 competitive, displace antitrust, because it's
19 antithetical, and we have to accept it for better or
20 worse. We just have to accept that.

21 It is in between.

22 In that case, how--is there a framework,
23 theoretical or practical, we should try to put our

1 arms around to deal with the role of antitrust in
2 those hybrid regulatory settings?

3 MR. MILLER: Let me distinguish two things.
4 Someone gave me a call yesterday, and we chatted
5 about a particular issue involving
6 telecommunications.

7 You have a situation where sometimes
8 companies follow the regulator's dictates about what
9 prices might be, and then there is some liability,
10 although I understand the courts have pretty much
11 ruled this out, of their being sued because of
12 monopoly pricing, but it was pursuant to a
13 regulator's dictates.

14 On the other hand, I don't think there is
15 any question that, if companies in competition are
16 regulated get together and engage in violations of
17 Section 1 or 2, they should not be immune from
18 prosecution.

19 And one other thing I mentioned in my
20 testimony is that, under the old ICC, even, the
21 trucking companies and the railroad companies were
22 not immune from antitrust liability to sit down and
23 talk about rates and engage in the rate-making

1 process. They were immune only insofar as the
2 Interstate Commerce Commission put the laying on the
3 hands of what they did and within the four corners of
4 what the ICC said they could do.

5 I agree that a lot of more modern regulation
6 has made it a little difficult, and the line is
7 blurred a little bit.

8 COMMISSIONER YAROWSKY: Well, let me ask you
9 this, because again, as at the beginning of this
10 segment, we tried to concretize. This raises issues
11 of drafting, legislative drafting, just like we're
12 talking about with the immunities and exemptions.
13 Should there be a presumption that unless the
14 antitrust laws are explicitly excluded from a
15 statute, they apply? What's the default position?
16 Should that be the default position?

17 Or should we say that, unless there is a
18 savings clause where it actually says at the end,
19 "And guess what; the antitrust laws apply?"--

20 So the question really is if Congress
21 doesn't write a savings clause that says, "And by the
22 way, the antitrust laws apply," should they not
23 apply?

1 Or should it be the reverse? Should we
2 assume the antitrust laws apply unless they are
3 explicitly excluded? Because this is again a
4 drafting suggestion that might be helpful to avoid a
5 lot of litigation for years and years and years.

6 MR. MILLER: Well, being the only non-lawyer
7 at the table, I think I am probably as well qualified
8 as most, to see it from the eyes of most Congressmen.

9 I think that, unless there is a savings
10 clause, the presumption is that the antitrust laws do
11 apply. However, this raises an important point,
12 because if I were at the Federal Trade Commission
13 with Alden, and my former colleagues and someone
14 brought to my attention, and if it were something
15 where the firm at risk had in fact, in good
16 conscience and in good will, carried out a
17 requirement of the regulator, I would see this as a
18 defense, even though there was not an explicit
19 exemption from antitrust. I would choose not to--I
20 mean I would use prosecutorial discretion not to take
21 issue with them even if I thought that the outcome
22 was a bad one or inefficient in some way. But of
23 course that wouldn't immunize from private liability.

1 MR. ROSS: I think that that suggestion is
2 an excellent one, for a number of reasons. First,
3 the way I would deal with the problem that Chairman
4 Miller talks about is to apply basically the same
5 doctrine we use in international law, the sovereign
6 compulsion defense.

7 So I have absolutely no problem--you know,
8 if somebody was price fixing because Margaret
9 Thatcher told them to, well, we are not going to
10 prosecute--true story--and likewise, if the ICC is
11 telling them not to do it--

12 But absent compulsion by the other
13 regulator, it seems to me that default rule against
14 implied immunity is incredibly important for a number
15 of reasons. And that has to do with the legislative
16 drafting process.

17 Who is best qualified to know what the
18 problems are, to realize that some regulatory mandate
19 might run afoul of the antitrust laws, to have the
20 expertise to at least start the drafting process?
21 It's the lawyers for the regulated companies, and
22 it's staff counsel for the industry, you know, at
23 FERC and FCC, and those are the guys who know that.

1 So if you tell them, if it is not absolutely
2 clear, that you don't get an immunity, that provides
3 a powerful incentive for them to do this. And if
4 your staff wants to go back into the books, there is
5 now an extensive law and economics literature on
6 default rules in contracting that talk a lot about
7 putting the burden on the default rule on the party
8 who has the most information as the one most likely
9 to lead to efficient contracting, and I think there
10 is a very good analogy here for that reason.

11 Make it absolutely clear what you suggested,
12 Commissioner Yarowsky, and then you will bring out--
13 this doesn't prevent anybody from doing anything they
14 want, but it just has to be done very clearly--and it
15 will bring the lobbyists and the agency counsels up
16 to the Hill to do their work.

17 COMMISSIONER YAROWSKY: Professor.

18 MR. CARSTENSEN: We have some more
19 transition issues, I think, than is fully appreciated
20 when you are moving from a market that was conceived
21 around command and control, and I'm thinking of
22 electricity and some of these other--and even
23 telecommunications. So I am a little nervous about--

1 okay, in the absence of a clear preemption of
2 antitrust, the antitrust court on its own should go
3 and start making decisions. But I think we have a
4 doctrine, the doctrine of primary jurisdiction, and
5 Professor Darren Bush in his comments raised that as
6 an--in his written comments, flagged that as a very
7 important tool here for the antitrust court to look
8 at some broader part of what an agency might be
9 trying to accomplish in this transition time.

10 There is a very interesting Ninth Circuit
11 opinion, the name of which I don't recall exactly,
12 involving natural gas distribution in California,
13 where it is more of a state action issue, but they
14 try to chart things out in terms of the relative role
15 of the regulator and the market in deciding when
16 fuller antitrust would apply, and I think that is a
17 helpful intermediate step that you may want to look
18 at.

19 COMMISSIONER YAROWSKY: Okay. Thank you
20 all.

21 MR. MILLER: Madam Chair, could I follow up
22 with the Vice Chair's point?

23 You know, my suspicion is that members of

1 Congress don't really know that they have all these
2 exemptions out there; they don't know. And putting
3 them all in one place, and bringing it to their
4 attention, I think, is going to be a very useful
5 thing.

6 I remember at the beginning of the Reagan
7 administration, we pointed out to the President that
8 his executive orders--and we had just gotten him to
9 sign Executive Order 12,291, which set up the
10 benefit-cost testing and reporting to OMB and all of
11 that, that these were his regulations. Those were
12 his regulations, and so we did a sunset, tried to do
13 a sunset, on these regulations, and of course people
14 came out of the woodwork and protested mightily, *et*
15 *cetera*. But he had not looked at them that way, and
16 others had not looked at them that way, and I suspect
17 members of Congress have really little conception of
18 what they have done here.

19 CHAIRPERSON GARZA: Thank you. Commissioner
20 Litvack.

21 COMMISSIONER LITVACK: I am not surprised,
22 and I doubt that anyone is surprised, that when you
23 have an antitrust commission and an antitrust hearing

1 with antitrust experts that everyone thinks
2 immunities aren't something that ought to be lightly
3 granted, and we ought to stay with the antitrust
4 laws. It would really be shocking to the world if we
5 reached some different conclusion.

6 So I don't have a lot to ask you. I mean,
7 yes, you all agree that there should be rigor, there
8 should be sunset, and all this should happen.

9 I have one general question, which is
10 probably slightly off the mark, anyway, but--look, we
11 have all these exemptions. They are there. Suppose
12 that everything you say is applied rigorously for the
13 future. What do we do about what's there?

14 And I guess my question is really the
15 following, to be specific:

16 Should there be, in fairness, any different
17 test or any different burden in terms of repealing or
18 sunseting these provisions than the one that has
19 been articulated with respect to the innovation or
20 granting of these immunities? Does anyone think
21 there should be a different test? And I guess I'll
22 start with Professor Ross since he seems the most
23 animated.

1 MR. ROSS: I think--I would say yes, and my
2 answer would be paradoxical. For members of Congress
3 who think about fairness, the greatest concern about
4 sunseting is with regard to the worst exemptions.

5 To go back--since they asked for and got 45
6 minutes, I guess they deserve it--to the Commerce
7 Department, there is no anticompetitive illegal
8 behavior at all. Oh, but we would certainly need a
9 transition period for all these people who have made
10 investments in reliance on the fact that their
11 behavior is perfectly legal and of course we will
12 never sue them, anyway--

13 I think it is hard to justify any
14 significant transition there. For the insurance
15 industry, for the very anticompetitive things that
16 they may be doing that may make the repeal of the
17 McCarran-Ferguson Act or significant narrowing of it
18 one of the more significant pro-consumer things, I
19 think there is a very fair question about how much
20 time you need, and I think Congress is uniquely
21 suited to make those sorts of judgments, both in
22 terms of antitrust law, and in terms of doing other
23 completely non-antitrust things.

1 One of the things--and I don't know if
2 Chairman Miller was involved in it--but I seem to
3 remember that there was a special tax break that
4 people who add value in an ICC license, primarily
5 because it gave you monopoly profits, and I think
6 they were allowed to depreciate that break over some
7 relatively--like a five-year period--as a way of
8 helping them out. And that was a change in the tax
9 laws.

10 So I think Congress has lots of tools that
11 it could use, and I think it is a legitimate case,
12 but there's that paradox there.

13 COMMISSIONER LITVACK: Chairman Miller, the
14 same question, except let me just change it just
15 slightly to, say, focus on the question of, with this
16 long list of exemptions, whether there should be some
17 burden, some inquiry to prove that they really have
18 been anticompetitive.

19 In other words, maybe most of them are no
20 harm, no foul. Maybe the antitrust laws should have
21 applied, but you can't show any adverse impact from
22 the immunity in the first place. Should there be any
23 studies to do that?

1 MR. MILLER: Well, I said in my statement
2 and orally, too, that I think that the adverse effect
3 on competition is less because the market is so
4 dynamic and technology moves so fast. But,
5 nevertheless, it is a good argument to eliminate most
6 of them.

7 Look, Congress works, as my professor now
8 deceased, Warren Nutter, used to say on the theory of
9 the thermostat. It's like the temperature has got to
10 rise to a certain point before the AC kicks in, and
11 fall a certain amount before the heat kicks on. You
12 have to get their attention. But if you've got a
13 good argument, you eventually can.

14 The first issue I worked on in graduate
15 school was the military draft. It was very
16 inefficient, and seven of my--six of my colleagues
17 and I wrote a book on the military draft, and four
18 years later--not just because of my effort, our
19 effort--but four years later, the draft ended.

20 COMMISSIONER LITVACK: We want to thank you.

21 (Laughter.)

22 MR. MILLER: And I started writing at the
23 time--you know, Ted Keeler and Bill Jordan and others

1 began to write about airline regulation. Hardly
2 anybody gave a passing thought to the inefficiencies
3 created by airline regulation. But yet I was there
4 when President Carter signed the airline deregulation
5 bill, and I am proud to say an economist helped lead
6 the CAB to make that happen.

7 And likewise, with trucking and railroad
8 deregulation, there an economist led the ICC, Darius
9 Gaskins.

10 And so, when you make a good argument and
11 the newspapers pick it up and show the inequities,
12 that tends to drive things more than an efficiency
13 argument, the inequities caused by that; it gets
14 Congress's attention.

15 The basic screen should be the same whether
16 it's existing immunities or new immunities. And I
17 think it was laid out in the paper of Mr. Ross and
18 his associates quite well.

19 COMMISSIONER LITVACK: Madam Chair, can I
20 allow the other two to ask the question?

21 CHAIRPERSON GARZA: Sure.

22 MR. ABBOTT: I would agree that the same
23 screen should be applied. I'm not endorsing a

1 specific screen, but with regard both to existing and
2 new proposed immunities, the burden should be on
3 those who propose the immunities or propose retaining
4 immunities. And that is because, with existing
5 immunities, it may be very hard to prove up the but-
6 for world. You can show why these are the benefits,
7 but there may be subtle costs that come to light only
8 after an exemption is repealed. So the fact--and
9 because it is so difficult to prove a but-for world,
10 it may be very difficult to prove that existing
11 exemptions have caused great damage.

12 But if benefits cannot be shown to follow
13 from the existing exemptions, it seems to me there is
14 still a substantial argument in principle for not
15 retaining them.

16 MR. CARSTENSEN: I think the point to focus
17 on is whether there are investments of various sorts
18 that need to be recovered or unexpected risks. And I
19 thought immediately of the Bank Merger Act that
20 changed our regulation of banking and also insulated
21 all previously consummated bank mergers from Section
22 7, but not from Section 2.

23 One might want to do that, for example, in

1 railroads, so that the Justice Department can't go
2 back and say we won *Northern Securities*, darn it,
3 we're going to reopen that case once again.

4 So one would want to look very carefully,
5 because there will be enormous incentives to say,
6 "Oh, my goodness, the world is coming to an end."

7 For example, I disagree with Steve about
8 insurance. Most of the insurance industry is
9 operating under a very competitive regime right now.
10 The transition costs of insurance companies are
11 minimal. There is a problem of shared pooled
12 prospective information that they have to worry
13 about, but that is not their major economic risk
14 invested in the enterprise.

15 COMMISSIONER LITVACK: Thank you all. Thank
16 you, Madam Chair.

17 CHAIRPERSON GARZA: Thank you. Commissioner
18 Kempf.

19 COMMISSIONER KEMPF: Yes, I want to thank
20 all of the panelists for your papers, and I
21 particularly want to thank Chairman Miller, because
22 you touched on stuff that I have been focused on from
23 our very first meeting.

1 I want to address two things in particular
2 with you. In your testimony, you refer to something
3 that is in your written testimony where you state
4 that there was a respectable body of academic
5 literature suggesting that the antitrust laws and
6 their enforcement may well do more harm than good,
7 and you suggested in your oral testimony that that is
8 something we should look at.

9 What specifically would you recommend in
10 that regard?

11 MR. MILLER: Well, I know the ABA meeting I
12 guess last year had a session on that issue, but that
13 would be something that you could take a look at.
14 But, you know, the underlying assumption of the
15 Commission's work is that the antitrust laws make
16 sense and--excuse me, at least in this issue of
17 antitrust immunities and exemptions. The default
18 assumption is that the antitrust laws really do
19 generate a lot of benefits at very low cost.

20 I would just say that that is an assumption
21 you ought to deal with, and you know, I don't mean
22 that you need to hold hearings on whether the
23 antitrust laws are good or bad, but I think it is

1 something that, in your report, you might make
2 reference to, and take a look at. Crandall's piece
3 and--Crandall and Winston and some of the things in
4 their piece. Their piece is cited quite often as an
5 example.

6 COMMISSIONER KEMPF: And you are careful in
7 your paper itself to again stress that everything
8 that follows that is all based on assumption, not on
9 fact.

10 MR. MILLER: Well, yes, it is based on an
11 assumption, but it is an assumption I think
12 predicated on reasonable conclusions that most people
13 have. I think people who argue that the antitrust
14 laws are not beneficial are very much the minority.

15 COMMISSIONER KEMPF: Let me next shift over
16 to the subject of the immunities and exemptions
17 themselves, and I particularly appreciate your
18 highlighting organized labor and farmers in your
19 testimony, both oral and written.

20 My fellow Commissioners have heard me say
21 numerous times that I have a concern that the
22 antitrust laws don't enjoy the respect that they
23 should among the general populace because so much of

1 our activity is price fixing every day, all day,
2 pursuant to a wide variety of exemptions and
3 immunities, and they have heard me tell the story of
4 the two guys in Iowa, one of whom is a farmer and the
5 other of whom is a farm-implement seller. They both
6 do a good job of price fixing, and they both get
7 their cover on the magazine. One is the "Man of the
8 Year," and they hold a big dinner for him, and the
9 other guy is in the "Police Gazette," and he goes to
10 jail. And they both do the same thing, basically.

11 But every time we get to talking about
12 antitrust immunities and exemptions, the ones I hear
13 most frequency are--we need to get rid of the
14 baseball exemption, which baseball pretends it
15 doesn't have yet allowed Paul Konerko to get \$60
16 million yesterday as a free agent; or the export
17 associations, which we spent 45 minutes on today, and
18 everybody says, "Gee, they have no impact at all, or
19 if they do, it's two guys in Bolivia who pay a little
20 bit extra for widgets."

21 Nobody wants to talk about either labor or
22 farming, and those cost hundreds of millions of
23 people hundreds of millions of dollars, because they

1 cover most of what we buy, the products we buy, and
2 much of what we eat.

3 To say that it's Don Quixote tilting at
4 windmills may be accurate, but my view is, unless you
5 focus on that reality, it's sort of silly to be
6 talking about exemptions that don't impact anybody.

7 So my focus has always been what do we do,
8 not about the exemptions and immunities that don't
9 impact anybody and nobody cares about one way or the
10 other, other than very small special interest groups,
11 but what about the big ones, labor and farming? If
12 we all recognize those are nearly impossible for
13 Congress to even look at, let alone change--

14 MR. MILLER: Well, I think you can chip away
15 at them and chip away at the extremes. The
16 president's executive order, basically causing
17 workers to understand that they have a right not to
18 contribute to political campaigning on the part of
19 the--undertaken by the unions, that is a way of
20 restraining certain, in my judgment, excesses of the
21 use of the antitrust immunity, but I don't know--you
22 chip away at it, and sometimes people in organized
23 labor are quite reasonable in understanding that

1 certain things make sense, and certain things don't
2 make sense, and I suspect there are people who feel
3 that, both in agriculture and in organized labor,
4 there has been some overreaching.

5 But when I say Don Quixote, I just do not
6 see a political will to take that on, on Capitol
7 Hill.

8 COMMISSIONER KEMPF: Steve.

9 MR. ROSS: If I could respond, I don't
10 disagree, but I think there is a little more to it,
11 and I think that if you adopt--look at our framework,
12 my suspicion is, you and John Sweeney would reach
13 very different results as you walked through the five
14 stages. But I think the framework really
15 accommodates this, and the labor exemption is a good
16 example. The Wagner Act was passed based on a view
17 that workers needed to be able to organize
18 collectively and collectively bargain, A, to prevent
19 unbelievable wealth transfer of their labor to
20 capital, and B, macroeconomically, to give them
21 purchasing power that would end up helping in the
22 economy.

23 It is a perfectly legitimate thing to say,

1 "That was 1935; this is 2005, and we ought to repeal
2 the National Labor Relations Act." But that is a
3 policy decision that Congress can make. And I think
4 that the labor exemption is a classic example of
5 something that is pursuing socially--in the view of
6 Congress--socially desirable activities, at least
7 when they passed it.

8 And it is a very fair question to ask
9 whether those things are still socially desirable,
10 and I am sure that, as I said, you and the AFL-CIO
11 would have very different views on that. But I think
12 that the framework that we are coming up with really
13 provides an answer to that. And I would suggest,
14 quite frankly, that, unlike some other exemptions
15 that may be sacred cows, the reason that the labor
16 exemption won't be repealed is that members of
17 Congress probably--at least enough of them to block
18 the legislation--probably just don't share the view
19 of critics of the labor exemption about the social
20 utility and wealth distribution that's going on.

21 The thrust that I made in the opening
22 paragraph is, if antitrust law is going to be
23 focused, like William Howard Taft said, on

1 competition, we have to allow Congress to make even
2 boneheaded political judgments about what is socially
3 desirable and what isn't.

4 MR. MILLER: What he was just saying makes
5 me think of a thought experiment. Suppose that
6 Congress had a secret ballot on these two issues.
7 The vote might be very clear. It might well go the
8 way of abolishing both.

9 COMMISSIONER KEMPF: Can I ask the Professor
10 just a quick follow-up question? What do you think
11 of taking the framework that you developed--somewhere
12 along the line, judgments you talked about in the
13 courts--they said, "Well, let's draw a line in this.
14 We've done enough of this already. We have *per se*
15 rules." What do you think about the courts'
16 abolishing *per se* rules and taking the framework you
17 put forth and saying, "Hey, let the courts make those
18 decisions as well as Congress?"

19 MR. ROSS: Well, as the first paragraph
20 expresses, I agree with William Howard Taft. I think
21 that is setting sail on a sea of doubt. I think
22 having generalist judges--I think it would be
23 troublesome enough to have the Federal Trade

1 Commission do that. At least they would be experts,
2 and they would be subject to the political changes.
3 A Jim Miller might view things differently than might
4 a Bob Pitofsky, and there would be the sensitivity.

5 To have it thrown up for grabs, and if you
6 happen to get Steve Reinhardt, you get one result,
7 and if you happen to get Alex Kozinski, you get a
8 very different result--I just don't think is a good
9 system.

10 COMMISSIONER KEMPF: Thank you.

11 CHAIRPERSON GARZA: I think Professor
12 Carstensen had something. We have time, I think, to
13 take a short response.

14 MR. CARSTENSEN: As the ag. person here, I
15 am the son of someone actually born on a farm in
16 Iowa. That's as close as I get in family ties. I
17 want to make sure we are a little clear about the ag
18 issues. For most agricultural commodities, there is
19 no cartel, there is--at least no government-protected
20 cartel. Capper-Volstead, on all the evidence by
21 itself, does not give farm co-ops any particular
22 leverage in the market.

23 What does create problems is the

1 Agricultural Marketing Agreement Act. I'm onboard
2 for getting rid of that one. But you have to
3 understand, it applies to fruits, nuts, and cows.
4 That is, dairy cows. And it is really only in the
5 dairy cow area that there is a serious problem,
6 because there, it is a relatively pervasive one.
7 There is some good evidence that it imposes
8 significant consumer costs and enormous
9 inefficiencies on the way our whole dairy product
10 system works.

11 There are enormous complexities in there.
12 If you can suggest to Congress it is really time to
13 bring dairy subsidies, whatever you want to do to
14 protect dairy farmers, into, gee, the 20th century,
15 maybe even the 21st century, I think there is some
16 real progress to be made there, and the time may be
17 now, because dairy farmers have fallen to quarreling
18 among themselves, and that gives a political opening.

19 CHAIRPERSON GARZA: Thank you. Commissioner
20 Valentine.

21 COMMISSIONER VALENTINE: Thank you all
22 obviously, for your statements.

23 I have been puzzled somewhat, like

1 Commissioner Litvack, over why we should be perhaps
2 so fair and evenhanded with respect to the existing
3 immunities and exemptions. I think the framework
4 that the three who gave us their eleemosynary efforts
5 makes lots of sense for immunities that we may see
6 coming down the pike, when Congress wants to get
7 about creating a new immunity--basic,
8 straightforward, fair balancing of costs and
9 benefits.

10 But I think, with respect to existing
11 immunities and exemptions--I mean we know that they
12 are not all the same. Some are really historic
13 anomalies and absolutely useless; some are more
14 harmful than others. And why wouldn't we want to
15 look at existing ones and say, okay, with respect to
16 certain that are historic curiosities or absolutely
17 are justified like ocean shipping or maybe some of
18 the detritus of the transportation statutes that
19 Professor Carstensen points out that are left over
20 from deregulation of those industries, just recommend
21 getting rid of them and be intellectually honest
22 about it?

23 And then with ones that apparently are just

1 --all that's going on is legitimate, procompetitive
2 joint venture activity, like Export Trade
3 Certificates, they don't need an immunity if all they
4 are doing is what Mr. Sullivan says that they are
5 doing.

6 So why don't we just say, "Okay, those don't
7 need it either," and I don't know whether Capper-
8 Volstead falls there or not?

9 Maybe others we make clear that, okay, we
10 will allow some immunity for the data pooling in the
11 McCarran area.

12 Why shouldn't we sort of bite the bullet a
13 little bit more? If we wait for Congress to review
14 all of these--I mean, unless we are going to sunset
15 them all tomorrow, this is going to take a long time
16 to get to a rational world.

17 MR. ROSS: That is a very good question,
18 which the framework doesn't address in terms of an
19 implementation. There are two ways that you guys
20 could approach this to address Commissioner
21 Valentine's question.

22 One is that the AMC could actually review
23 exemptions and comment on them. We had been told

1 through staff that that was at least not your initial
2 preference, which is why we tried to come up with a
3 general framework. But that obviously is not in
4 stone, and that's obviously one possibility, and for
5 those that you see fit, if there is sufficient
6 consensus, you can just recommend repeal, and there
7 you go.

8 The other possibility would be to have a
9 staged sunset; the Federal Trade Commission shall
10 report in one year on any exemptions for which it
11 feels little justification exists, and those where it
12 feels some substantial justifications exist, and
13 anything where little justification exists, is
14 sunsetted in two years. And anything where the
15 Federal Trade Commission--

16 MR. MILLER: Unconstitutional.

17 MR. ROSS: Well, all right. Anyway, there
18 are ways to work the--

19 COMMISSIONER LITVACK: The one non-lawyer
20 says to us.

21 (Laughter.)

22 MR. ROSS: But there are ways to set it up.
23 You could set it up like the base-closing commission,

1 and--

2 MR. MILLER: But you would have to vote on
3 it.

4 MR. ROSS: You would have to vote on it, but
5 it's an up and down or something like that. But
6 there is a process that you could work out to do
7 that.

8 But I think the way the two choices you
9 have, if you want to address existing immunities, it
10 seems to me, are either directly substantive comments
11 by the AMC or setting up some framework for a staged
12 sunseting of existing immunities.

13 COMMISSIONER VALENTINE: Can I ask one
14 question? This is on page 8 of your report. It
15 comes up in stage two. And either it's a null-
16 setter, an oxymoron, or I'm not reading properly.
17 You are talking about--okay, you want to show pro-
18 consumer justifications, and the justification should
19 be based on a legislative determination that the
20 immunized conduct would enhance consumer welfare.
21 And you say, "Okay, now this is going to be hard
22 since the antitrust laws themselves are designed to
23 promote consumer welfare." And then you say, "Thus,

1 a valid pro-consumer justification for an immunity
2 from these very laws, the antitrust laws, would
3 likely be limited to cases where the conduct in
4 question may create antitrust liability under
5 existing antitrust statutes in case law, even though
6 research and experience has demonstrated that conduct
7 to be pro-consumer."

8 What conduct fits in this box?

9 MR. ROSS: Well, I think there are a couple
10 of things. One is--and the testimony may suggest
11 that in the minds of Congress the last sentence here
12 may have been an empirically inaccurate prediction--
13 one would be the sort of chilling-effect problem.
14 It's perfectly legitimate conduct, but people don't
15 do it. I was talking to Professor Carstensen in the
16 morning session, and the facts are that everybody
17 said that the National Cooperative Research Act was
18 completely unnecessary, because everything was legal,
19 and why can't they just even go get business review
20 letters?

21 Well, you passed the statute and way more
22 people filed than had previously sought business
23 review letters.

1 This strikes me as economically irrational
2 behavior, but since I'm not an economist, I'm
3 prepared to accept that people don't always behave
4 economically rationally, and so that may be a
5 legitimate reason for an exemption.

6 This was Commissioner Burchfield's comment
7 earlier. People need comfort for ill-founded
8 misperceptions. And that is one possibility.

9 The other possibility--

10 COMMISSIONER VALENTINE: "May create
11 antitrust liability" means people wrongfully and
12 improperly perceive that the antitrust laws could be
13 misapplied to them?

14 MR. ROSS: Right. And the second situation
15 is a situation where a law may be--and I think this
16 is where you're thinking of the--but the law, where
17 the case law is wrong. But, for whatever reason,
18 Congress might find it not to be a great idea to
19 simply change the case law.

20 Let me give you an example, a counterfactual
21 example, on the real facts. The district court in
22 the *Topco* case found that exclusive territories were
23 absolutely essential for small grocery store

1 cooperatives to exist.

2 Now actually, that turned out to be
3 completely wrong, because I still buy Topco products
4 today, and they found a very easy way to get around
5 with no problems with the exclusive territories.

6 But let's assume that was correct, and as
7 Justice Blackmun said in his concurrence in *Topco*,
8 this is a shame because Topco is going to go out of
9 business, and this is terrible.

10 Now Congress might well have decided, and I
11 would think properly, that it was not going to
12 legislatively rewrite Section 1 to come up with a new
13 rule for joint ventures, that that was something it
14 really needed to let go forward.

15 On the other hand, these particular
16 exclusive territories in small market cooperatives
17 might be pro-consumer, so they might want to pass an
18 immunity from the law.

19 Now this is a narrow set of circumstances,
20 but it seems to me that there are circumstances where
21 you are immunizing things from what Congress thinks
22 is bad law, bad case law, but Congress quite properly
23 decides we do not want to open up the Pandora's box

1 of completely redrafting the law of horizontal
2 restraints or the law of vertical restraints or, you
3 know, anything like that in order to solve the one
4 problem where, to use Chairman Miller's analogy, the
5 thermostat has forced the air conditioning on.

6 COMMISSIONER VALENTINE: Okay.

7 CHAIRPERSON GARZA: Commissioner Cannon.

8 COMMISSIONER CANNON: Steve, listening to
9 you, I can close my eyes and go back to 1982, when we
10 used to have these exact same arguments, sitting
11 around the conference table in the Judiciary
12 Committee, if you remember. Some I won, some he won,
13 I think.

14 But listening to all of this, I mean, in the
15 end I am in fact looking at you and Jim Miller and
16 myself and Jon Yarowsky here, going back a few years
17 where we had precisely the same arguments, and
18 looking at the Report that you guys did--especially
19 on the area of kind of less restrictive alternatives,
20 that's what a lot of those things were all about.
21 Beginning with the NCRA and then heading into, if you
22 remember, the Local Government Antitrust Act that we
23 were all involved in--

1 To Jim's point, you know, a lot of these
2 things that get on the books are the results of their
3 being essentially event driven. I think you would
4 probably agree with that. Would you, or would you
5 not? Let me get you to opine.

6 MR. ROSS: The Local Government Antitrust
7 Act and the substance of it was absolutely completely
8 driven by one large jury verdict in Illinois, and the
9 Federal Trade Commission's pro-consumer challenge to
10 a City--I think it was a taxicab regulation.

11 COMMISSIONER CANNON: New Orleans, Louisiana
12 is, I believe, where it was. Is that right, Jim?

13 MR. MILLER: We sent an attorney down there,
14 and we were not sure he would make it back.

15 (Laughter.)

16 COMMISSIONER CANNON: But that is the point.
17 And I have had more than my share of questions today,
18 so I don't want to take up time; we're running a
19 little bit late.

20 But in the end, as I remember, all of our
21 discussions on the Local Government Antitrust Act,
22 obviously a bad case or at least a lot of the state
23 and local and municipal government community viewed

1 it as a very bad case, prior to that case coming out,
2 after the *City of Boulder* case, everyone said, "Well,
3 it's theoretically possible that a municipality could
4 be held liable for antitrust damages, but it will
5 never happen." And then about two months later it
6 happened.

7 And so it seemed to me that, if you recall,
8 I remember very well a lot of folks coming to the
9 Hill on their cost-benefit analyses, which is exactly
10 what you are talking about, saying, "Well, look, this
11 is horrific because you can see taxpayer dollars
12 going to pay damages."

13 But what I think the Congress did at that
14 point was essentially engage in your analysis up to a
15 point for a less restrictive alternative and said,
16 "No, we are not going to exempt this conduct or
17 exempt these entities from the antitrust laws. We
18 are going to make injunctive relief available, and we
19 are going to eliminate a damage remedy."

20 So am I missing this, or is that exactly
21 what we are talking about here today?

22 MR. ROSS: My memory isn't good enough to
23 say that Congress actually used the framework, but

1 certainly I think the approach of focusing on less
2 restrictive alternatives and then why things were
3 necessary and the insistence that one of the tools of
4 a less restrictive alternative was the Federal Trade
5 Commission's continued ability to scrutinize those
6 things, which was a key piece of the puzzle, I think
7 is an important one. Although, *à propos* of that, I
8 will note for the suggestion about committee
9 jurisdiction, that at that time, the idea that we
10 would put this pool together and lift an
11 appropriation restriction on the FTC and make
12 substantive changes led a--not Jon Yarowsky, but
13 another House Judiciary Committee staffer with an
14 otherwise impeccable record of strong antitrust
15 enforcement to opine that he didn't care if the
16 Sherman Act were repealed or the Federal Trade
17 Commission zero budgeted as long as the first bill
18 came out of the Judiciary Committee and the second
19 bill came out of the Appropriations Committee.

20 So I think it also recognizes the importance
21 of recognizing clear turf battles in Congress in this
22 process.

23 COMMISSIONER CANNON: Jim.

1 MR. MILLER: Could I--your question, Steve,
2 just triggered a thought in my mind. One thing the
3 Commission might want to address is the tolling of
4 any agency comments on regulations engaged in by the
5 federal government or by state governments,
6 specifically on agricultural marketing orders.

7 When I was at the FTC, we had the audacity
8 to say some things about agricultural marketing
9 orders, and then we had an appropriations rider
10 preventing our spending any money to say anything
11 about that.

12 MR. ROSS: And the same thing about
13 insurance.

14 MR. MILLER: Insurance was there already,
15 and when I went over to be Director of OMB, they put
16 an appropriations rider on that so I couldn't say
17 anything about agricultural marketing orders from
18 OMB. And then I had the audacity to propose
19 privatizing the PMAs, the power market
20 administrations, and they put an appropriations rider
21 on it so I couldn't, say, at least spend any taxpayer
22 money. I guess the First Amendment gave me the
23 authority to say whatever I dadgum well pleased on my

1 own private hook.

2 But that is an interesting issue you might
3 at least flag there.

4 But let me just, I think in a fundamental
5 way, ask the question of whether that was good
6 legislation. The Federal Trade Commission took issue
7 with the city of New Orleans for monopolizing its
8 taxicab industry, and there were interstate commerce
9 effects.

10 Well, basically, the statute put us out of
11 business in that regard, but was that a good thing or
12 bad thing? I think it was a bad thing, because if
13 you had--and if the taxpayers of New Orleans allowed
14 their elected officials to engage in anticompetitive
15 behavior, they should hold those officials
16 responsible and replace them.

17 COMMISSIONER CANNON: Alden, did you want to
18 say something? You looked like you were--

19 MR. ABBOTT: I think I will--

20 COMMISSIONER CANNON: I had a feeling you
21 might.

22 MR. ABBOTT: Brevity is the soul of wit at
23 this point.

1 COMMISSIONER CANNON: Well, you are very
2 witty, no doubt.

3 (Laughter.)

4 CHAIRPERSON GARZA: Well, you know, I
5 actually have found the written comments and the oral
6 comments here today to be very helpful to me in my
7 thinking, and most of my questions have been asked
8 and answered. But I do have one thing that I wanted
9 to raise maybe a little on the margin.

10 You know, there are certain--not all
11 exemptions are equal. They are very complex. And
12 there are some like the standard-setting organization
13 legislation recently passed, the NCRA, to some extent
14 I think, the Export Trading Company Act that some
15 have argued, not really exemptions--special
16 treatment, maybe, but they are really aimed at
17 addressing another concern that we have been
18 addressing in the Commission, which is the
19 inefficient impact of the fear of treble-damage
20 actions, which some people have minimized here, but
21 from time to time I think people have been concerned
22 that, when it comes to the formation of joint
23 ventures and cooperative action of competitors, the

1 threat of treble-damage litigation in particular can
2 be very significant and can keep that from happening.
3 So you have the NCR; enough people seriously thought
4 it was a concern that they took the time, spent the
5 money to actually lobby for something.

6 Now at that point they didn't get a
7 straight-out immunity from the antitrust laws, but
8 what people came up with was something along the
9 lines of activity--that the only activity that is
10 covered is the activity that we think would be
11 subject to rule of reason, which isn't *per se* legal,
12 but rule of reason, therefore subject possibly to
13 litigation and very expensive, protracted litigation.

14 But it applied to activity that we thought
15 of as being subject to the rule of reason, and it
16 required transparency; it required disclosure. So
17 you didn't have the smoky room kind of things. If
18 what you were going to do had to be disclosed,
19 everybody had to have a chance to look at, the
20 government agencies had to have a chance to object to
21 it, and indeed, private parties could still challenge
22 it, although they couldn't necessarily get treble
23 damages, but maybe that's not such a bad thing,

1 because maybe it's not bad conduct--

2 This reasoning seems not too inconsistent to
3 me with what people were telling us earlier on in the
4 hearings, that, hey, we think that maybe you should
5 consider recommend a detrebling of--or, you know, for
6 certain types of conduct.

7 So I guess my question is, do you all see
8 things like the NCRA and the SSO and the Export
9 Trading Company Act as equally bad as some of the
10 other immunities and exemptions that we have been
11 talking about today?

12 Professor Ross.

13 MR. ROSS: I have to disclose here that my
14 views on this have changed since Steve Cannon bought
15 me lunch at the American Café and we negotiated
16 Senator Metzenbaum's graceful withdrawal of his
17 opposition to detrebling in the NCRA.

18 But I have come 180 degrees on that question
19 that was of so much concern to my former boss. I
20 think these immunities are very different, and I
21 think that they are a good thing. Without going into
22 the entire general detrebling debate--which we
23 obviously don't have time to talk about--let me give

1 you my perspective, which comes from my study of
2 Canadian law, where they don't have treble damages.

3 And that is one of the essential elements, I
4 think, that makes the American economy competitive
5 and vibrant, that we have a minimum viable scale of a
6 plaintiffs' bar. And in that--that is an externality
7 that transcends any particular case. And that is why
8 I would be so strenuously opposed to a wholesale
9 detrebling, even a detrebling of rule of reason along
10 the lines that you talk about.

11 But having said that, I think that there are
12 areas where there are general deterrents, and I think
13 public policy is actually better served by
14 maintaining treble damages as the normal rule and
15 allowing a minimum viable scale for a plaintiffs bar,
16 and then exempting congressionally where you can go
17 through this cost-benefit analysis and you can show
18 that careful drafting in the matters that you are
19 exempting really are likely to be procompetitive, and
20 it is sunsetted for periodic review. I actually--
21 that is a preferable way to go.

22 And there are many reasons for it, but I
23 will just out the one that I mentioned as one that

1 perhaps the Commission hasn't had a chance to think
2 about.

3 CHAIRPERSON GARZA: Anyone else want to
4 comment?

5 MR. CARSTENSEN: Well, I guess I would throw
6 in the thought that, in our work on the monograph, we
7 have really come to talk about exemptions and then
8 modifications of antitrust law as a way of separating
9 out these things on treble or elimination of damages,
10 but allowing other remedies.

11 I am also struck by your description--again,
12 the problem is the uncertainty going in, and the
13 apparent reluctance which Steve tells me is
14 economically irrational, to use the business review
15 clearance process.

16 CHAIRPERSON GARZA: Have you ever tried to
17 use the business review clearance process?

18 MR. CARSTENSEN: No.

19 CHAIRPERSON GARZA: Okay. Thank you.

20 MR. CARSTENSEN: I was at the receiving end
21 years ago when I worked at the Antitrust Division,
22 but it does seem to me that again thinking--one of
23 the things to think about rather than the trebling

1 versus detrebling, which may not be a very good
2 discriminator among the cases that ought or ought not
3 to be subject to damage claims, to think more about
4 whether you want to recommend an improved, less
5 daunting clearance process that might work more
6 generally as a way of addressing some of these
7 concerns and uncertainties that individual clients--
8 because they are going to come from all over. All
9 different kinds of business transactions. And we do
10 get these silly event-specific, you know--Charitable
11 Donations Antitrust Immunities Act or the Anti-Hog
12 Cholera Serum Act. It would be nice to have a
13 different method of dealing with the problem of
14 giving some comfort to legitimate business
15 transactions.

16 CHAIRPERSON GARZA: I don't mean to be too
17 flip about the business review process, but the one
18 thing I think happened at the time of the NCRA--I
19 think people considered the possibility of doing
20 something like the exemption, the block exemption in
21 the EU and decided that they specifically didn't want
22 to have the Justice Department looking at that.

23 Commissioner Burchfield?

1 COMMISSIONER BURCHFIELD: Thank you. I will
2 be brief.

3 First of all, Chairman Miller, I appreciated
4 your comments about the political monopoly, and if
5 the 12 votes of this Commission were sufficient to
6 overturn the five votes in the *McConnell* case, I
7 would certainly be an advocate to do that.

8 The only comment that I have goes to the
9 point that Professor Carstensen was just making,
10 which is the business review process. To the degree
11 that these exemptions have arisen--and some of them,
12 I think, have out of either misperceptions or fear
13 that antitrust laws would be improperly applied to
14 legitimate competitive activity, does the panel think
15 that a revived or modified business review process at
16 the Justice Department might help eliminate some of
17 that concern?

18 My experience with the business review
19 process--and I haven't used it in years--is that
20 there is ample concern by clients going in that,
21 rather than getting a business review letter, you
22 might get an antitrust investigation by going in and
23 asking for approval of a particular transaction.

1 Comments on that, Professor Ross?

2 MR. ROSS: Well, that's a good explanation
3 for what struck me as otherwise being economically
4 irrational, and if that is true, I think that is a
5 serious concern.

6 But the problem I have is the mismatch
7 between that and the arguments made. To use the one
8 experience that I know most about, the idea that--I
9 mean if you think about it, I don't know that the
10 government has challenged a research venture that was
11 filed, and there had been--the only case that the
12 government ever brought on that is something I just
13 like to illustrate in class is obvious--when GM--I
14 think the Big Three, and when they were only the Big
15 Three, all agreed that they would only do research on
16 catalytic converters themselves with this one joint
17 venture that they would all contribute \$10 to or
18 something.

19 So I guess I still don't understand, like in
20 the context of joint ventures, why somebody would
21 say, "Oh, now that we have got the potential for
22 detrebling, we are going to file this thing because
23 the government might sue us, but then we'll get this

1 great protection of detrebling," but, gee, in 1983,
2 "We better not file for these perfectly legitimate,
3 procompetitive R&D joint ventures because the
4 government might sue us."

5 There is still somewhat of a disconnect
6 there, I think, but one of the things I try to do as
7 a law professor is realize that I am a professor and
8 not a real lawyer, so I will sort of let you real-
9 world people try to figure out why that really goes
10 on.

11 COMMISSIONER BURCHFIELD: Any other
12 comments? Professor Carstensen?

13 MR. CARSTENSEN: Well, I do think that you
14 highlighted the point of the down side of coming in,
15 and I don't--again, because I don't--I haven't done
16 any of this, and when I did do it, I was at the
17 Justice Department--I don't have much of a feel for
18 whether there is a way that could reduce that risk.

19 I'm inclined to think that these are
20 transactions, since they are proposed transactions,
21 proposed ventures, that really wouldn't raise--
22 shouldn't raise--much of a risk unless what the
23 client is really concerned about is all the other

1 parts of its baggage that might get exposed, and I
2 did recently, for other reasons, go trundling through
3 and see that there were a substantial number now of
4 business review clearances of some fairly complex
5 information exchanges, joint ventures in
6 transportation, ocean shipping, in fact.

7 So it looks to me as though this is a better
8 route for those who pursue it than maybe some of the
9 past experience and mythology might suggest. And so
10 again, like Steve, I retreated to the monastery here,
11 and don't have the hands-on feel for how to tweak
12 that process.

13 CHAIRPERSON GARZA: Thank you very much to
14 all of the witnesses, again, for both your written
15 testimony, your presence here today, your toleration
16 of our questions. You have been very gracious and
17 also very helpful.

18 Thank you.

19 MR. HEIMERT: The hearing is adjourned.

20 [Whereupon, at 4:21 p.m., the hearing was
21 adjourned.]
22